

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

In the
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 10 1963

No. 17,976

882

Nathan J. Paulson
CLERK

TEXAS STATE AFL-CIO, ANTONIO AGUILAR,
JULIA AMAYA, *et al.*,

Appellants,

v.

ROBERT KENNEDY, ATTORNEY GENERAL,
and RAYMOND F. FARRELL, COMMISSIONER OF
IMMIGRATION AND NATURALIZATION,
Government Appellees,
and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES
(LEYVA), CONCEPCION AURORA CAGIGAS FRAJO, *et al.*,
Intervenor Appellees.

*On Appeal from Judgment of District Court of
District of Columbia Dismissing Action*

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†Formal headings and certificates of service have been omitted in printing.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA
Civil Action No. 3468-61

PLAINTIFFS' ORIGINAL COMPLAINT FOR
DECLARATORY JUDGMENT AND ORDER
IN NATURE OF MANDAMUS
(Filed October 20, 1961)

To the Honorable United States District Court:

Now come Texas State AFL-CIO, Antonio Aguilar, Rodolfo Alvarez,* Julia Amaya, Arthur Lee Avant, Herman James Backler, Thomas Barlow, Antonio Bocanegra, Ramon Casarez, Henry A. De La Garza, Gregorio Del Rio, Roberto C. Dominguez, Ernestina Enriquez, Armando Garcia, George Graddy, Jr., Leonard H. Henley, Guadalupe Hernandez, Aloys J. Kesi, Hector V. Leon, Ricardo Lucero,* Jack L. Mahaffey, Alberto Martinez, Augustine Marquez, George E. Montuth, James T. Nakovic, Altagracia B. Ocon, Jesus Ocon, Carlos Pacheco, Hector Pacheco, Angel Rodriguez, Leonardo Ruiz, Angel Salazar, Jose H. Salazar, Enrique Sanchez, Joe Dale Scott, Carlos I. Soto, James Sprecker, Armando Tellez, Roberto Tellez, Bernardino Torres, Armando Vargas, Isidro Vasquez,* Daniel B. Villegas, James E. Wright, Severo Adame, Armando Barragan, Ramona G. Bill, Hector F. Castro, Vicente Esquivel, Emeterio Favela, Jr., Antonio Frausto,* Jose S. Garza, Francisco Guanajuato, Guadalupe E. Guzman, Preciliano B. Ibarra, Jose G. Jimenez, Salvador Jimenez, Arturo Martinez, Juan R. Martinez, Manuel Nieto, Ramiro Olivares, Rogelio Patino, Jose Barrera Salas,

*Name withdrawn from list of plaintiffs, therefore not included in appeal. See p. 110, *infra*.

Juanita C. Salas, Esperanza G. Sandoval, Margarito Sandoval, Felix San Miguel, Jr., Josefina G. San Miguel, Juan Hernandez Tristan, Enrique Villegas, Pedro Aguero, Sr., Felix Alva, Velia Barragan, Gilberto Cantu, Rodolfo Cantu, Toribio G. Cantu, Martiniano Cardenas, Ernesto Chavez, Jesus Chavez, Ruperto Chavez, Manuel Cruz, Theodore R. Delapass, Andres Dimas, Leopoldo Dominguez, Dolores Elizondo, Francisco Fernandez, Nieves E. Gallardo, Arturo V. Garcia, Ramon Garcia, Victor M. Garcia, Martha Gonzalez, Rufino Granado, Rafael Guerra, Maria Jesus Hernandez, Ramon Hilario, Jose A. Juarez, Jr., Aida Leyva, Santiago R. Licon, Daniel Lombrano, Diana Lozano, Julia Maldonado, Roas Maria Maldonado, Jose G. Martinez,* Celestino Mata, Encernacion Mata, Jose Mata, Jose Mendoza, Heriberto Molina, Benito Moreno, Carlos Moreno, Jr., Maria Azucena Moreno, Maria Guadalupe Moreno, Oscar Noriega, Reynaldo C. Paez, Hector L. Pearson, Jose G. Quintanilla, Jose Angel Ramirez, Alfredo Andres Ramon, Jr., Pable Renteria, Antonio D. Rodriguez, Jesus M. Rodriguez, Roberto Rodriguez, Tiburcio Rodriguez, Juan Rogerio, Oscar M. Rogerio, Ricardo Rogerio, Raul Sanchez, Juan Saenz, Aniceto M. Saucedo, Emilia M. Saucedo, Ernestina Schunior, Ildefonso Sernz, Jr., Leopoldo Serna, Blas Solis, Genero S. Solis, Carlota C. Tijerina, Lino Torres, Daniel M. Valdez, Alberto Vargas, Abraham Vasquez, Adelina Vasquez, Cruz Vasquez, Pedro Veliz,* Mary Becerra, Maria N. Canales, Elidia Cano, Ernestina C. Garcia, Roberto Garcia, Leonelo H. Gonzalez, Antonio Hernandez, Roberto Martinez, Jose I. Ramirez, Jose Garza Ramos, Jr., Basilio Reyes, Jose Saenz,

*See footnote, page 2.

Marcelo M. Soliz, Hermila Soto, Eleno Soza, Ofelia Vasquez, Alfredo Z. Alanis, Ernesto Z. Alaniz, Raul Atkinson, Juan M. Balli, Juventino Barbosa, Ralph Delgado, Feliciano E. Elizondo, Oralia Elizondo, Francisco Fuentes, Jose C. Garcia, Manuel S. Garcia, Jessie Garnello, Telesforo Garza, Guillermo C. Hernandez, Tomas Hull, Mary Anita Johnson,* Bailey Kenley,* Raul G. Lopez,* Manuel Moran, Maruicio Moran, Victor Manuel Moran, Jesus Moreno, Juan Pena, Rodolfo Revuelta, Daniel Rodriguez, Manuel Rodriguez, Elijio Ruth, Alfonso A. Trevino, Eliseo S. Trevino, Jose R. S. Trevino and Jose Villegas complaining of Robert F. Kennedy, Attorney General of the United States and Joseph M. Swing, Commissioner of the United States Immigration and Naturalization Service, defendants, and for cause of action respectfully show the following:

1.

Plaintiff Texas State AFL-CIO is a voluntary labor organization composed of affiliated labor organizations operating in the State of Texas. Said plaintiff maintains its office and principal place of business in the City of Austin, Travis County, Texas. Its principal executive officers are H. R. Brown, President and Roy R. Evans, Secretary-Treasurer. Among the purposes for which said plaintiff labor organization is organized are the following objects quoted from its Constitution:

"To bring about the cooperation of all workers in order that through such cooperation the full resources of the labor movement will be available to advance the interests and welfare of Texas workers, as well as the interests and well-being of all people everywhere.

*See footnote, page 2.

"To encourage the extension of the benefits of collective bargaining to all workers and to promote the organization of the unorganized into unions of their own choosing * * *

"To encourage all workers, without regard to race, creed, color, national origin or sex, to share equally in full benefits of union organization and in the democratic management of union affairs * * *

"To protect and strengthen our democratic institutions, to secure full recognition and enjoyment of the rights and liberties to which we are justly entitled, and to preserve and perpetuate the cherished traditions of our democracy."

2.

The individual plaintiffs who bring this action are each bona fide residents of the United States and the State of Texas.

(a) The following named individual plaintiffs all reside in the County of El Paso, Texas:

Antonio Aguilar, Rodolfo Alvarez, Julia Amaya, Arthur Lee Avant, Herman James Backler, Thomas Barlow, Antonio Bocanegra, Ramon Casarez, Henry A. De La Garza, Gregorio Del Rio, Roberto C. Dominguez, Ernestina Enriquez, Armando Garcia, George Graddy, Jr., Leonard H. Henley, Guadalupe Hernandez, Aloys J. Kesi, Hector V. Leon, Ricardo Lucero, Jack L. Mahaffey, Alberto Martinez, Augustine Marquez, George E. Montuth, James T. Nakovic, Altagracia B. Ocon, Jesus Ocon, Carlos Pacheco, Hector Pacheco, Angel Rodriguez, Leonardo Ruiz, Angel Salazar, Jose H. Salazar, Enrique Sanchez, Joe Dale Scott, Carlos I. Soto, James Sprecker, Armando Tellez, Roberto Tellez, Bernardino Torres, Armando Vargas, Isidro Vasquez, Daniel B. Villegas and James E. Wright.

(b) The following named individual plaintiffs all reside in the County of Valverde, Texas:

Severo Adame, Armando Barragan, Ramona G. Bill, Hector F. Castro, Vicente Esquivel, Emeterio Favela,

Jr., Antonio Frausto, Jose S. Garza, Francisco Guana-
juato, Guadalupe E. Guzman, Preciliano B. Ibarra,
Jose G. Jimenez, Salvador Jimenez, Arturo Martinez,
Juan R. Martinez, Manuel Nieto, Ramiro Olivares,
Rogelio Patino, Jose Barrera Salas, Juanita C. Salas,
Esperanza G. Sandoval, Margarito Sandoval, Felix San
Miguel, Jr., Josefina G. San Miguel, Juan Hernandez
Tristan and Enrique Villegas.

(c) The following named individual plaintiffs all reside
in the County of Webb, Texas:

Pedro Aguero, Sr., Felix Alva, Velia Barragan, Gilberto
Cantu, Rodolfo Cantu, Toribio G. Cantu, Martiniano
Cardenas, Ernesto Chavez, Jesus Chavez, Ruperto
Chavez, Manuel Cruz, Theodore R. Delapass, Andres
Dimas, Leopoldo Dominguez, Dolores Elizondo, Fran-
cisco Fernandez, Nieves E. Gallardo, Arturo V. Garcia,
Ramon Garcia, Victor M. Garcia, Martha Gonzalez,
Rufino Granado, Rafael Guerra, Maria Jesus Hernan-
dez, Ramon Hilario, Jose A. Juarez, Jr., Aida Leyva,
Santiago R. Licon, Daniel Lombrano, Diana Lozano,
Julia Maldonado, Rosa Maria Maldonado, Jose G.
Martinez, Celestino Mata, Encarnacion Mata, Jose
Mata, Jose Mendoza, Heriberto Molina, Benito Moreno,
Carlos Moreno, Jr., Maria Azucena Moreno, Maria
Guadalupe Moreno, Oscar Noriega, Reynaldo C. Paez,
Hector L. Pearson, Jose G. Quintanilla, Jose Angel
Ramirez, Alfredo Andres Ramon, Jr., Pablo Renteria,
Antonio D. Rodriguez, Jesus M. Rodriguez, Roberto
Rodriguez, Tiburcio Rodriguez, Juan Rogerio, Oscar M.
Rogerio, Ricardo Rogerio, Raul Sanchez, Juan Saenz,
Aniceto M. Saucedo, Emilia M. Saucedo, Ernestina
Schunior, Ildefonso Sernz, Jr., Leopoldo Serna, Blas
Solis, Genero S. Solis, Carlota C. Tijerina, Lino Torres,
Daniel M. Valdez, Alberto Vargas, Abraham Vasquez,
Adelina Vasquez, Cruz Vasquez and Pedro Veliz.

(d) The following named individual plaintiffs all reside
in the County of Hidalgo, Texas:

Mary Becerra, Maria N. Canales, Elidia Cano, Ernes-
tina C. Garcia, Roberto Garcia, Leonelo H. Gonzalez,

Antonio Hernandez, Roberto Martinez, Jose I. Ramirez, Jose Garza Ramos, Jr., Basilio Reyes, Jose Saenz, Marcelo M. Soliz, Hermila Soto, Eleno Soza and Ofelia Vasquez.

(e) The following named individual plaintiffs all reside in the County of Cameron, Texas:

Alfredo Z. Alanis, Ernesto Z. Alaniz, Raul Atkinson, Juan M. Balli, Juventino Barbosa, Ralph Delgado, Feliciano E. Elizondo, Oralia Elizondo, Francisco Fuentes, Jose C. Garcia, Manuel S. Garcia, Jessie Garnello, Telesforo Garza, Guillermo C. Hernandez, Tomas Hull, Mary Anita Johnson, Bailey Kenley, Raul G. Lopez, Manuel Moran, Mauricio Moran, Victor Manuel Moran, Jesus Moreno, Juan Pena, Rodolfo Revuelta, Daniel Rodriguez, Manuel Rodriguez, Elijio Ruth, Alfonso A. Trevino, Eliso S. Trevino, Jose R. S. Trevino and Jose Villegas.

3.

Plaintiff Texas State AFL-CIO brings this action in its representative capacity on behalf of its members and the members of organized labor affiliated with said plaintiff, directly or indirectly.

4.

The individual plaintiffs named in paragraph 2 herein above bring this action on behalf of themselves individually and as representative of a class of persons who are so numerous as to make it impracticable to bring them all before the Court. Said individual plaintiffs, however, are representative both geographically and by occupation of the class or group whom they represent, and they will fairly insure the adequate representation of the entire class. The character of the rights sought to be enforced for such class is several, and there is a common question of law and/or

fact affecting the several rights and a common relief is sought.

5.

Defendant Robert F. Kennedy is the Attorney General of the United States and maintains his office at the Department of Justice, Constitution Avenue and Ninth Street, N. W., Washington, D. C. As Attorney General said defendant is charged with the administration and enforcement of the laws of the United States relating to the immigration and naturalization of aliens pursuant to Title 8, U.S.C., §1103(a). He has control, direction, and supervision of all employees and of all the files and records of the Immigration and Naturalization Service of the United States. In accordance with the aforesaid statute he establishes such regulations, prescribes such forms of bond, reports, entries, and other papers, issues such instructions, and performs such other acts as he deems necessary for carrying out his authority under the provisions of Chapter 12 of the Immigration and Naturalization Act (8 U.S.C., §1101-1503). He is authorized to confer responsibilities and authority for the administration of the Immigration and Naturalization Service to a commissioner, pursuant to Title 8, U.S.C., §1103(b).

6.

Defendant Joseph M. Swing* is the commissioner of the Immigration and Naturalization Service appointed in accordance with Title 8, U.S.C., §1103(b). He maintains an office in Washington, D. C. at the Department of Justice.

*Raymond F. Farrell, present Commissioner of Immigration and Naturalization, has been automatically substituted as defendant in place of former Commissioner Swing, by operation of Rule 25(d), F.R.C.P., as amended. See p. 95, *infra*.

Said defendant is charged with the responsibility and authority of the administration of aforesaid Chapter 12 (Immigration and Naturalization Act) which have been conferred upon him by the Attorney General.

7.

This Honorable Court has jurisdiction of this action under 28 U.S.C. §1331, this being a matter in controversy exceeding the sum and/or value of ten thousand dollars (\$10,000.00) exclusive of interest and costs, and arises under the laws of the United States, specifically the Immigration and Nationality Act of 1952, 8 U.S.C. §1101 et seq, and also has jurisdiction under the provisions of 8 U.S.C. §1329.

8.

On July 8, 1960, the Honorable Luther W. Youngdahl, Judge of the United States District Court for the District of Columbia rendered an Opinion in Civil Action No. 3630-59, styled *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. William P. Rogers and Joseph M. Swing*, in which he declared the law applicable to a class of persons generally known as "alien commuters" or "commuting aliens." Judge Youngdahl noted that "since 1927, commuters have been considered *immigrants* and, the defendants [the Attorney General of the United States and the Commissioner of Immigration and Naturalization] go on to say, aliens lawfully admitted for permanent residence—Mexican and Canadians with permanent employment in the United States, but who return each night to Mexico or Canada, *have been given the status of aliens lawfully admit-*

ted for permanent residence in order to permit them to pursue their employment in the United States." (Emphasis added.)

Although the Court in that case was faced with the immediate question of whether §212(a)(14) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1182(a)(14) was applicable to commuting aliens, in order to answer this question the Court first had to determine the legal status of these commuters. Therefore, Judge Youngdahl noted that these "further questions arise: Are commuters aliens lawfully admitted for permanent residence? If not, can they be so treated administratively for the limited purpose of permitting their employment in the United States?"

The Court answered the questions with reference to the applicable statutory definitions as follows:

"The term 'lawfully admitted for permanent residence' is defined by §101(a)(20) of the Act, 8 U.S.C.A. §1101(a)(20) as:

'the status of having been lawfully accorded the privilege of *residing* permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.' (Emphasis added.)

"The term 'residence' is defined by §101(a)(33) of the Act, 8 U.S.C.A. §1101(a)(33) as:

'the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. * * *'

The Court therefore concluded and held as follows:

"With these legislative statements as a guide, it is clear that Mexican commuters do not reside in the United States,

and it therefore is not possible for them to be aliens lawfully admitted for permanent residence. This should not mean, however, that Mexicans or Canadians cannot commute to work in the United States. *The defendants can utilize the documentary requirements and administrative procedures they think best under the applicable law for aliens who work in this Country and live in Mexico or Canada.* If the defendants are satisfied that an alien can enter the United States to work here, they could then permit the alien to commute."

The Court then stated that "It is not sufficient to resort to an 'amiable fiction' to justify a wholesale evasion" of a certification by the Secretary of Labor under §212(a)(14) of the Act, and held that for purposes of this section such commuters "must be excluded just as any other Mexican nonresident alien. To do otherwise would be to permit administrative practice to make a shambles of a provision which, with §101(a)(15)(H), was newly designed by the 1952 Act in order to assure 'strong safeguards for American Labor.' [citing H. Rep. 1365, 82d Cong. 2d Sess., 50 (1952)]"

The cited §101(a)(15)(H) of the 1952 Act, which provides basis for entry of aliens for employment purposes under conditions which safeguard American Labor reads as follows:

"(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

“(H) an alien having a residence in a foreign country *which he has no intention of abandoning* (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability; or (ii) *who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country;* or (iii) who is coming temporarily to the United States as an industrial trainee.” (Emphasis added.)

Judge Youngdahl’s Opinion concluded that “commuters” are not within the class of “returning lawfully domiciled resident aliens.”

9.

On February 15, 1961, this United States District Court, by order of Judge Leonard P. Walsh, granted plaintiff’s motion for summary judgment in said Case No. 3630-59, which was based upon the aforesaid Opinion of Judge Youngdahl. The defendants, who at this later time were the same as the defendants in the instant action, filed no appeal, and said order is now a final judgment of the Court.

10.

Notwithstanding the clear declaration of law contained in this Court’s ruling in the *Amalgamated Meat Cutters’ case*, as set out hereinabove, the defendants have continued to confer the status of aliens “lawfully admitted for permanent residence” upon commuting aliens who do not intend to reside permanently in the United States and who in fact

reside and intend to reside in Mexico. Likewise, defendants have continued to recognize the status of aliens "lawfully admitted for permanent residence," and have failed and refused to cancel such status as to commuting aliens who were previously granted such status.

11.

And further, notwithstanding the clear declaration of law contained in this Court's ruling in said *Amalgamated Meat Cutters' case*, defendants have failed and refused to "utilize the documentary requirements and administrative procedures" available under the applicable law, to wit, under Title 8 U.S.C. §1101(a)(15)(H) and Title 8 U.S.C. §1184, as a means to permit Mexican aliens to live in Mexico and work in the United States under conditions which will not jeopardize the working conditions and employment opportunities of bona fide residents of the United States.

12.

The said Immigration and Nationality Act of 1952 contains a comprehensive procedure whereby defendants can admit aliens for employment in the United States under conditions which assure "strong safeguards for American labor." Among these provisions are Title 8 U.S.C. §1101(a)(15)(H) quoted in paragraph 8 hereinabove (§101(a)(15)(H) of said Act), and Title 8 U.S.C. §1184 which provide the following:

"(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under

such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

“(b) Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title. An Alien who is an officer or employee of any foreign government or of any international organization entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act, or an alien who is the attendant, servant, employee, or member of the immediate family of any such alien shall not be entitled to apply for or receive an immigrant visa, or to enter the United States as an immigrant unless he executes a written waiver in the same form and substance as is prescribed by section 1257(b) of this title.

“(c) The question of importing any alien as a non-immigrant under section 1101(a)(15)(H) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant. June 27, 1952, c. 477, Title II, ch. 2, § 214, 66 Stat. 169.” (Emphasis added.)

Title 8 U.S.C. §1101(a)(6) provides the following definition of "border crossing identification card" and the legal purposes of such a card:

"(6) The term 'border crossing identification card' means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to *an alien who is a resident in foreign contiguous territory*, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations." (Emphasis added.)

Said Act limits the status of "an alien who is lawfully admitted for permanent residence" by expressly requiring that such status be a continuing one, "such status not having changed." This is contained in the following provision of the Act, Title 8 U.S.C. (a)(20):

"The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed*." (Emphasis added.)

The Act further provides a precise definition as to how such "status" could change, to wit, by change in "residence" or by failure to comply with the requirement of permanence.

The terms "permanent" and "Residence," as used in the Act, are defined in the following provisions:

Title 8 U.S.C. §1101(a)(31): "The term '*permanent*' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." (Emphasis added.)

Title 8 U.S.C. §1101(a)(33): "The term '*residence*' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 1350 and 1352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States." (Emphasis added.)

The proviso reference to §1101(a)(33) allows an exception as to certain dual nationals and naturalized citizens (§1350 and 1352), but the Act provides no exception to the requirement of actual, bona fide residence in the United States for persons who have been granted permanent resident alien status.

15.

Defendants have available to them ample procedural authority to obtain compliance with the provisions of said Act relating to the granting and obtaining of permanent resident alien status and the continued maintenance, without change, of such status. Such procedures include, but are

not limited to, Title 8 U.S.C. §1203, 1225, 1226 and Title 8 U.S.C. 1361, which provide, in part, as follows:

"Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this chapter, and, if an alien, that he is entitled to the nonimmigrant, quota immigrant, or nonquota immigrant status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of this chapter."

16.

As to literally thousands of commuting aliens, (the exact number being unknown to the plaintiffs but it is estimated to exceed fifty thousand persons) defendants have failed and refused to enforce the provisions of the Immigration and Nationality Act of 1952, especially those provisions cited herein above.

17.

Defendants have largely ignored the provisions of Title 8 U.S.C. §§ 1101(a)(15)(H) and 1184 as a source of alien labor which can be made available without displacing the employment of workers in the United States. Instead, defendants have knowingly permitted the use of permanent

resident alien status by commuting aliens who are residents of contiguous foreign territory. By this "amiable fiction," I-151 border crossing identification cards, which are designed solely for issuance to bona fide residents of the United States with a current status of permanent resident alien, are used as a device to permit daily commutation entry of residents of a foreign country for the sole purpose of engaging in employment in the United States. Such use violates the Act, and is in derogation of the letter and intent of said Act regarding use of the express provisions referred to herein above, and also Title 8 U.S.C. §1182 (a) (14), for entry of aliens to engage in employment under conditions which will safeguard domestic labor.

18.

As a result of defendants' action and inaction referred to in paragraphs 16 and 17 above, the entire economy along the Mexican-United States border has severely suffered. Especially in the Texas counties bordering the Rio Grande River, serious unemployment, low wages and forced migration of United States residents have been proximately caused by the vast influx of aliens who commute daily from their residences in Mexico to jobs in Texas. Such commuters have wrongfully and illegally been granted and allowed to maintain the status of "permanent resident alien" by the defendants. These commuters, whose ranks are increased by thousands each year, provide a virtually inexhaustible supply of cheap labor which, because it comes into this country under "immigration" provisions rather than under "labor" provisions of the statute, comes in without any limitation

and subject to no safeguards. These commuters work in all types of jobs, especially in jobs which are not subject to the bare minimum wages and protections of the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* For example, many work for as little as \$2.50 per day as maids or \$3.75 per day as laundry workers, and many commute to construction jobs in the United States where they are paid substantially below the prevailing rates paid to domestic workers, who are available to perform such work but for the presence of commuting aliens who are able and willing to work for wages which are less than living wages to workers residing in the United States where the standard and cost of living is substantially higher than that which exists on the opposite side of the border where the commuters reside.

In recent years especially, the normal depressing effect of this influx of commuters upon wage rates has also been felt upon job opportunities. As a result of the thousands of daily commuters engaging in employment on the United States side of the border, thousands of bona fide United States residents, capable of performing such work, have been forced into unemployment. Thousands of others have been forced into annual migrations to seek employment in distant parts of the United States.

19.

The individual plaintiffs herein are among these bona fide United States residents who have been directly damaged as a result of defendants' action and inaction, set out herein above, of permitting commuting aliens to enter the

United States for purposes of employment without regard to the provisions of the Act which provide safeguards for American workers. Each of said individual plaintiffs has been unemployed for various periods during the years 1960 and 1961, at a time when commuting aliens with I-151 border crossing identification cards were working at jobs in the United States which plaintiffs were capable of performing. Said plaintiffs are typical and representative of tens of thousands of persons similarly situated along the Rio Grande River who have been unemployed while commuting aliens were working at jobs which residents were capable of performing. These persons are too numerous to be brought before the Court as parties to this action, but they comprise a class which will be fairly represented by the plaintiffs herein.

20.

Many of the members of organized labor represented by plaintiff Texas State AFL-CIO and its component labor unions likewise have suffered and are suffering unemployment because commuting aliens are employed in jobs which these members are capable of performing. In addition, their wage rates have remained low because of the competition with the substandard wages paid to commuting aliens.

21.

Plaintiff Texas State AFL-CIO and its component labor unions have also suffered as a result of defendants' action and inaction regarding commuting aliens, because such aliens have provided employers with a virtually endless

supply of employees who are willing to work for low wages and, because of their precarious status as "immigrants" and their residence in a foreign country, are almost guaranteed to be non-union. Such commuters also prevent or discourage American labor organizations from engaging in legitimate strike activity to improve wages and working conditions because commuting aliens have provided an ever ready source of strike breakers available to work despite strike conditions.

22.

A by-product of the conditions created by defendants' policy of permitting these commuting aliens to enter the United States for temporary—daily—periods to work, under conditions which undermine the job security and standards of workers who live in the United States, is the creation of animosity between the United States and its good neighbor Mexico. It is an affront to Mexico that a legal fiction is used, rather than the normal means of treaties and laws, as a device whereby workers on both sides of the border are being exploited by wages which are too low for United States workers to live on and just high enough to attract aliens from all parts of Mexico, but not high enough to benefit the economy of either country. In fact, these wages have caused the economy along the Rio Grande River to be chronically depressed, with wages which are among the lowest in the entire nation. Use of the statutory provisions to permit entry of aliens to perform labor which will not undermine working conditions will tend to strengthen the Mexican and the United States economy along the border.

Such use, however, regardless of its effect, is the course of action charted by Congress with the passage of the 1952 Act, hence is required by law.

23.

Plaintiffs and the persons whom they represent, have been and will be damaged in amounts which cannot be accurately calculated. Such damage resulting from lost wages, if continued, will exceed many millions of dollars in lost wages.

24.

Said damage results from the failure of the defendants to apply their clear, non-discretionary legal duty, as set out in detail herein above.

25.

Plaintiffs have no other legal means of obtaining legal redress for defendants' failure to act in accordance with their non-discretionary statutory duty, and unless the relief prayed for herein is granted, plaintiffs and the persons whom they represent will be irreparably damaged.

WHEREFORE, PREMISES CONSIDERED, plaintiffs individually and severally, respectfully pray that a declaratory judgment issue declaring that commuting aliens, as that term is used herein, have no legal status and are not aliens lawfully admitted for permanent residence in the United States, and that the law be declared in accordance with the definitions contained in this complaint; further

that an order in the nature of mandamus issue requiring the defendants to cease conferring the status of "alien lawfully admitted for permanent residence" upon commuters or persons who intend to maintain their residence in foreign contiguous territory and requiring, that commuting aliens be denied further recognition as "aliens lawfully admitted for permanent residence" so long as such persons do not maintain their actual bona fide residence in the United States; and that plaintiffs have such other relief, special or general, at law or in equity, to which they may be entitled as remedy for their cause or causes of action, and that they be awarded their court costs.

MULLINAX, WELLS, MORRIS &
MAUZY,
1601 National Bankers Life
Building,
Dallas 1, Texas.

By /s/ CHARLES J. MORRIS

J. ALBERT WOLL,
736 Bowen Building,
Washington, D. C.

By /s/ J. ALBERT WOLL

ANSWER OF GOVERNMENT DEFENDANTS

(Filed December 19, 1961)

Come now defendants by their attorney, the United States Attorney, and fully answering the complaint aver as follows:

First Defense

The Court lacks jurisdiction over the subject matter.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

The complaint asserts a political question with respect to which this Court lacks jurisdiction.

Fourth Defense

The nature of the relief sought by the complaint is an advisory opinion which this Court lacks jurisdiction to render.

Fifth Defense

The injury to plaintiffs alleged by the complaint is too remote to give standing to sue.

Sixth Defense

Plaintiffs have failed to join the alien commuters as indispensable parties to this cause.

Seventh Defense

The complaint fails to show a justiciable case or controversy.

Eighth Defense

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1. Answering the allegations of paragraph 1 of the complaint, defendants admit the allegations of the first sentence but have neither knowledge nor information sufficient to form a belief as to the truth of the remaining allegations of the said paragraph.

2 and 3. Defendants have neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 of the complaint.

4. Answering the allegations of paragraph 4 of the complaint, defendants admit only that the individuals named in paragraph 2 of the complaint bring the action on behalf of themselves individually. Further answering, defendants have neither knowledge nor information sufficient to form a belief as to the truth of the remaining allegations of the said paragraph.

5 and 6. The allegations of paragraphs 5 and 6 of the complaint are admitted.

7. The allegations of paragraph 7 of the complaint are denied.

8. Defendants are not required to answer the allegations of paragraph 8 of the complaint as they are immaterial and

contain conclusions of law. But, to the extent that answer may be required, defendants admit that on July 8, 1960, the Honorable Luther W. Youngdahl, United States District Judge, rendered an opinion in this Court in *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. William P. Rogers and Joseph M. Swing*, Civil Action No. 3630-59. Further answering, defendants refer the Court to the said opinion and the statutes cited by plaintiff as the best evidence of the contents thereof and deny the remaining allegations of the said paragraph.

9. Defendants are not required to answer the allegations of paragraph 9 of the complaint as they are immaterial and contain conclusions of law. But, to the extent that answer be required, defendants admit that on February 15, 1961, this Court, by order entered by Judge Leonard P. Walsh, granted the motion of the plaintiff Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, for summary judgment except insofar as the mandatory or injunctive relief sought by the said plaintiff therein was not granted. Further answering, defendants refer the Court to the said order entered by Judge Walsh in Civil Action No. 3630-59 as the best evidence of the contents thereof, admit that the said order is now a final judgment therein as no appeal was prosecuted, admit that the defendant Swing was a defendant in Civil Action No. 3630-59, and deny the remaining allegations of the said paragraph of the complaint.

10 and 11. Defendants are not required to answer the allegations of paragraphs 10 and 11 of the complaint as

they are immaterial and contain conclusions of law. But, to the extent that answer be required, defendants deny that they are performing the activities or actions alleged in paragraphs 10 and 11 of the complaint in contravention of law, admit that they have continued to confer the status of aliens lawfully admitted for permanent residence upon commuting aliens pursuant to the Government's commuter program of some 35 years, admit that they have continued to recognize commuters as having the status of aliens lawfully admitted for permanent residence, and deny the remaining allegations of the said paragraphs of the complaint.

12, 13, 14 and 15. Defendants are not required to answer the allegations of paragraphs 12, 13, 14 and 15 of the complaint as they are immaterial and contain conclusions of law. But, to the extent that answer be required, defendants aver that the commuter program is based on procedures not proscribed by the Immigration and Nationality Act of 1952 or any other statute, refer the Court to the statutes cited by plaintiff as the best evidence of their content, and deny the remaining allegations of the said paragraphs of the complaint.

16. The allegations of paragraph 16 of the complaint are denied, except that defendants estimate the number of commuting aliens to be somewhat less than fifty thousand persons.

17. Defendants are not required to answer the allegations of paragraph 17 of the complaint as they are immaterial and contain conclusions of law. But, to the extent that

answer be required, defendants admit that they have knowingly permitted the entry of alien commuters having the status of aliens lawfully admitted for permanent residence under the Immigration and Nationality Act of 1952 and deny the remaining allegations of the said paragraph of the complaint.

18. Defendants are not required to answer the allegations of paragraph 18 of the complaint as they are immaterial and contain conclusions of law. But, to the extent that answer be required, the said allegations are denied.

19. Answering the allegations of paragraph 19 of the complaint, defendants deny the first sentence and have neither knowledge nor information sufficient to form a belief as to the truth of the remaining allegations of the said paragraph.

20 and 21. Defendants have neither knowledge nor information sufficient to form a belief as to the truth of the allegations of paragraph 20 and 21 of the complaint.

22. Answering the allegations of paragraph 22 of the complaint, defendants deny the first, second and fourth sentences and have neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained in the third sentence of the said paragraph. Further answering, defendants are not required to answer the allegations of the fifth sentence of the said paragraph as they are conclusions of law but, to the extent answer be required, deny such allegations.

23. Defendants have neither knowledge nor information sufficient to form a belief as to the truth of the allegations of paragraph 23 of the complaint.

24. The allegations of paragraph 24 of the complaint are denied.

25. Defendants are not required to answer the allegations of paragraph 25 of the complaint as they contain conclusions of law. But, to the extent answer be required, defendants state that they have neither knowledge nor information sufficient to form a belief as to the truth of the allegations of the said paragraph. All remaining allegations of the complaint are denied.

/s/ DAVID C. ACHESON

DAVID C. ACHESON

United States Attorney

/s/ CHARLES T. DUNCAN

CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ JOSEPH M. HANNON

JOSEPH M. HANNON
Assistant United States Attorney

/s/ HAROLD D. RHYNEDANCE, JR.

HAROLD D. RHYNEDANCE, JR.
Assistant United States Attorney

Of Counsel:

/s/ MAURICE A. ROBERTS

Maurice A. Roberts
Attorney

Department of Justice
Washington 25, D. C.

MOTION TO INTERVENE AS DEFENDANTS

(Filed December 30, 1961)

Come now by their attorneys, Tomas Alvarado (Lugo), Carlotta Arellanes (Leyva), Concepcion Aurora Cagigas Fraijo, Maria Felix Carrera, Manuel Salvados Guzman Castellanes, Vicenta Contreras (Lozano), Juana Renteria de Alarcon, Francisco de la Cruz, Francisco Garcia, Vincente Valenzue Gil, Jesus Maria Gonzales, Petra H. Gomez, Carmen Gomez-Mares, Adalberto Lopez, Francisco Lozano (Vollejo), Ruben Nares (Munoz), Lucia Parra-Vasquez, Jose Juan Gonzales Rosas and Antonio Tovar-Ramirez, hereinafter referred to as Applicants for Intervention, and move the Court for leave to intervene of right under Rule 24(a) of the Federal Rules of Civil Procedure, as defendants in this action. Applicants for Intervention, both as individuals and as representatives of a class, seek leave to intervene and to assert in the main action the defenses set forth in their proposed answer, a copy of which is attached hereto.

I

Each Applicant for Intervention is a Mexican citizen who has been classified by the United States Immigration and Naturalization Service as being an immigrant and as being lawfully admitted for permanent residence. Each Applicant for Intervention commutes from his or her home in Mexico to regular employment in the United States. Applicants for Intervention seek leave to intervene in this action in order to protect the status and rights that they (and all other Mexican commuters similarly classified by the United States

Immigration and Naturalization Service) have been accorded under the immigration laws of the United States. The issues raised in the main action are of vital and most serious importance to Applicants for Intervention because Plaintiffs seek to change the long standing and continuous practice of the Immigration and Naturalization Service, dating back to 1925, of classifying Mexican (and Canadian) aliens who commute from their homes in Mexico (or Canada) to jobs in the United States as "Immigrants." Plaintiffs contend that commuters should be classified instead as "non-immigrants" and that they should be denied the right to commute from their homes in Mexico to employment in the United States. If Plaintiffs were to prevail in their contentions, Applicants for Intervention would lose this right to commute and this, in turn, would result in grave and severe hardship for them and their families. Accordingly, Applicants for Intervention seek leave to become parties to this action.

II

Applicants for Intervention seek to intervene not only as individuals on their own behalf, but also seek to intervene on the grounds stated herein, under Rule 23(a)(3) of the Federal Rules of Civil Procedure on behalf of a class of all Mexican aliens who have been lawfully admitted for permanent residence to the United States and who commute from their homes in Mexico to jobs in the United States. The persons constituting this class are so numerous as to make it impractical to bring them all before the Court. Applicants for Intervention fairly insure the representation of the

others in the class. The character of the right sought to be protected, namely, the status and rights of commuting aliens, is several. This case involves a common question of law and fact affecting these several rights and a common relief is sought.

III

Applicants for Intervention move for leave to intervene as defendants in this action *of right* under Rule 24(a) of the Federal Rules of Civil Procedure, both as individuals and as representatives of a class. They seek to intervene of right and to file the attached answer on the grounds that the representation of their interest by the present party defendants would be inadequate and that in practical effect, since the action invokes their rights and status, they would be bound by the judgment in this action.

Representation of their interest by the present party defendants would be inadequate because the interest of the present party defendants is different from the interest of Applicants for Intervention. The present party defendants must have as their primary concern the overall public interest: Applicants for Intervention have a private and particularized interest in this action, namely, the protection of their rights under the Immigration Laws of the United States.

IV

WHEREFORE, Applicants for Intervention pray the Court to enter an order permitting their intervention *of right* as defendants in this action. However, if the Court

should deny this request, Applicants for Intervention pray for leave to intervene as defendants in this action *permissively* under Rule 24(b) of the Federal Rules of Civil Procedure, both as individuals and as representatives of a class. They pray, in this circumstance, to intervene permissively and to file the attached answer on the grounds that the interest of Applicants for Intervention and the issues raised in the main action involve common questions of law and fact, and that granting this motion of Applicants for Intervention will result in no undue delay or prejudice to the rights of the original parties.

CHAPMAN, WOLFSOHN & FRIEDMAN
932 Pennsylvania Building
Washington 4, D. C.

By /s/ Martin L. Friedman

Martin L. Friedman

By /s/ Michael J. Shea

Michael J. Shea

PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE

(Filed January 4, 1962)

To the Honorable Judge of Said Court:

Now come plaintiffs in the above entitled and numbered proceeding and file this their Response to the Motion to Intervene filed on behalf of Tomas Alvarado (Lugo), Carlotta Arellanes (Leyva), Concepcion Aurora Cagigas Fraijo, Maria Felix Carrera, Manuel Salvados Guzman Castellanes, Vicenta Contreras (Lozano), Juana Renteria de Alarcon, Francisco de la Cruz, Francisco Garcia, Vincente Valenzue Gil, Jesus Maria Gonzales, Petra H. Gomez, Carmen Gomez-Mares, Adalberto Lopez, Francisco Lozano (Vollejo), Ruben Nares (Munoz), Lucia Parra-Vasquez, Jose Juan Gonzales Rosas and Antonio Tovar-Ramirez, and for such response respectfully show the following:

1.

Said applicants for intervention were not entitled to intervene as of right pursuant to Rule 24(a)(2). This action is in the nature of mandamus requiring officials of the United States government to perform their statutory duties and, as Judge Youngdahl previously determined in the related case of *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Rogers & Swing*, such commuters are not indispensable parties to the action. Furthermore, the United States Attorney can and undoubtedly will provide adequate representation for the position of the defendants herein.

2.

Permissive intervention is not proper herein for it will unduly delay these proceedings. Applicants for intervention do not show themselves to be representative of the class which they purport to represent, therefore, at best, they are representatives of themselves individually.

WHEREFORE, PREMISES CONSIDERED, plaintiffs pray that the aforesaid Motion to Intervene be denied.

Respectfully submitted,

MULLINAX, WELLS, MORRIS & MAUZY
1601 National Bankers Life Bldg.
Dallas 1, Texas

By /s/ CHARLES J. MORRIS

Charles J. Morris

J. ALBERT WOLL
736 Bowen Building
Washington, D. C.

By /s/ J. ALBERT WOLL

ORDER GRANTING INTERVENTION

(Entered January 29, 1962)

This cause came on to be heard on the motion of Applicants for Intervention for leave to intervene of right under Rule 24(a) of the Federal Rules of Civil Procedure as defendants in this action, both as individuals and as representatives of a class, and the Court having granted the said motion.

It is hereby ORDERED, ADJUDGED AND DECREED that Applicants for Intervention be allowed to intervene under Rule 24(a) of the Federal Rules of Civil Procedure as defendants in this action, both as individuals and as representatives of a class. It is further ordered that the original copy of the proposed Answer of Interveners, which was filed as an exhibit to the Motion to Intervene and to which were attached the original copies of nineteen affidavits, be entered in this proceeding as the answer of the Interveners.

Done this 29th day of January, 1962.

/s/ EDWARD M. CURRAN

Judge, Edward M. Curran

ANSWER OF INTERVENERS

(Approved for filing January 29, 1963)

Come now Interveners by their attorneys, both as individuals and as representatives of the class of Mexican aliens (1) who have been lawfully admitted for permanent residence to the United States and (2) who commute from their homes in Mexico to jobs in the United States, and answer the complaint as follows:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter.

Third Defense

The Plaintiffs have no standing to sue.

Fourth Defense

The questions and issues raised by the Complaint are "political" questions which involve foreign and domestic policy considerations and they are questions to be decided by the Executive branch of the government and not by the courts. The Complaint does not present a justiciable case or controversy.

Fifth Defense

Interveners are citizens of Mexico who have been granted the status of immigrants and of being lawfully admitted

for permanent residence to the United States. Their home is in Mexico and they commute, in accordance with the recognized practice of the Immigration Service, to jobs in the United States. If they were to be suddenly denied the right to commute, great and serious hardship would result for them and their families. The nature of this hardship is pointed out in the affidavits of each Intervener (who are typical members of the class they represent), attached hereto and made a part of this answer. Because of the grave hardships that would result, assuming arguendo, that the Court has any jurisdiction herein, the circumstances of the suit are such that the Court should not exercise its extraordinary discretion in Plaintiff's favor.

Sixth Defense

The classification, status and rights afforded the afore-described class of commuters is in accordance with the long standing practice of the Immigration Service, a practice which dates back to 1925. This practice is in accordance with law and was approved by and was not proscribed by the 1952 Immigration and Nationality Act or by any other act.

Seventh Defense

Answering specifically the paragraphs of the Complaint, Interveners aver:

1 and 2. Answering the allegations of paragraphs 1 and 2, Interveners state that they are without knowledge or information sufficient to form a belief as to the truth of the averments therein contained.

3 and 4. Answering paragraphs 3 and 4, Interveners state that they are without knowledge or information sufficient to know whether Plaintiff union and the individual Plaintiffs truly or adequately represent the persons and classes alleged and Interveners demand strict proof of these allegations by Plaintiffs. Interveners admit the allegation of paragraph 4 that the individuals named in paragraph 2 bring the action on behalf of themselves individually.

5 and 6. The allegations of paragraphs 5 and 6 are admitted.

7. The allegations of paragraph 7 of the Complaint are denied.

8 and 9. The allegations of paragraphs 8 and 9 of the Complaint are conclusions of law to which answer by the Interveners is unnecessary. However, if required to answer, Interveners admit that Judge Youngdahl rendered the opinion mentioned; that Judge Walsh granted the motion of Plaintiff Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, for summary judgment except that the mandatory or injunctive relief sought by the said Plaintiff was not granted; that the order of Judge Walsh is the final judgment in the action; and that no appeal was taken from the order of Judge Walsh. Interveners deny specifically that the order of Judge Walsh was "based" upon the opinion of Judge Youngdahl, and further deny all other allegations of paragraphs 8 and 9. Furthermore, Interveners state that the instant action is entirely different from the action brought by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-

CIO. The issue in that case was whether a commuting alien lawfully admitted for permanent residence is subject to exclusion under a Certificate issued by the Secretary of Labor pursuant to the authority conferred by Section 212(a)(14) of the Immigration and Nationality Act of 1952. In the instant action, no certificate is involved. Instead, Plaintiffs here seek to mandamus the Attorney General and the Commissioner of the Immigration and Naturalization Service to exercise their power of discretion in such a way as to deny the right to commute to alien commuters lawfully admitted for permanent residence—regardless of whether there is or is not a Certificate issued by the Secretary of Labor.

10, 11, 12, 13, 14 and 15. The allegations of paragraphs 10, 11, 12, 13, 14 and 15 are conclusions of law to which answer by the Interveners is unnecessary. However, if answer is required, Interveners deny that the activities and action of the Immigration and Naturalization Service are contrary to the Immigration and Nationality Act of 1952 or any other statute.

16. Interveners have no knowledge or information sufficient to allow them to admit or deny Plaintiffs' estimate as to the number of commuting aliens. The remaining allegation of paragraph 16 is a conclusion of law not requiring an answer. If an answer were required, the allegation would be denied.

17. The allegations of paragraph 17 are conclusions of law to which answer by the Interveners is unnecessary. But,

to the extent that answer be required, Interveners deny the allegations of paragraph 17.

18, 19, 20, 21 and 22. In paragraphs 18, 19, 20, 21 and 22, Plaintiffs seek to allege the injuries they have suffered as a result of Defendants' activities or inactivities. Interveners deny that Plaintiffs have suffered any injury as a result of Defendants' action or inaction. The allegations of these paragraphs are immaterial and are conclusions of law to which answer by the Interveners is not necessary. However, if answer were required, the allegations are denied. Interveners deny all of the general conclusions set forth in these paragraphs and demand specific and demonstrable proof of each injury alleged by Plaintiffs.

23 and 24. The allegations of paragraphs 23 and 24 of the Complaint are denied.

25. The allegations of paragraph 25 are conclusions of law to which answer by Interveners is unnecessary. However, if answer is required, Interveners state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph.

All allegations of the Complaint not specifically admitted are denied.

CHAPMAN, WOLFSOHN & FRIEDMAN
932 Pennsylvania Bldg.
Washington 4, D. C.

By /s/ Martin L. Friedman

Martin L. Friedman

By /s/ Michael J. Shea

Michael J. Shea

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me TOMAS ALVARADO (LUGO), who, after being sworn, stated and deposed as follows:

1. That he is a citizen of Mexico, and that he resides at 1579 Libertad South, Ciudad Juarez, State of Chihuahua, Mexico.

2. That he has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.

3. That he possesses an alien registration receipt card dated September 19, 1955.

4. That he exercises the right to commute.

5. That he supports in Mexico his wife, six children and his mother who is old.

6. That he is employed in El Paso, Texas as a polisher.

7. That if he were to lose his right to commute, it would work great personal and economic hardship on himself and his family; that he would be financially unable to bring all whom he supports to the United States, and that he would be unable to support two homes.

/s/ Tomas Alvarado Lugo
Affiant, Tomas Alvarado (Lugo)

SUBSCRIBED and SWORN TO before me on this 17th day of November, 1961.

/s/ Louis M. Foix

Louis M. Foix, Sr., Notary Public in and
for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me CARLOTTA ARELLANES (LEYVA), who, after being sworn, stated and deposed as follows:

1. That she is a citizen of Mexico and that she resides at 382 South Uruguay St., Ciudad Juarez, State of Chihuahua, Mexico.
2. That she has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence", after having obtained a visa.
3. That she was issued on December 5, 1955 and is possessed of an alien registration receipt card No. A 10482969.
4. That she exercises the right to commute and that she has been commuting since December 5, 1955 from her home in Mexico to employment in the United States.
5. That she is employed at a hotel in El Paso and that she has been employed there ever since she began commuting.

6. That she resides in Juarez with her father and mother and two younger brothers; that her father is sickly and does not work and that her two younger brothers are attending schools; and that she is the sole support of this home.

7. That it would be a most severe hardship for her to lose the right to commute; that she could not bring the others in her family with her to the United States and that she could not support two homes.

/s/ Carlotta Arellanes Leyva
Affiant, Carlotta Arellanes (Leyva)

SUBSCRIBED and SWORN TO before me on this 17th day of November, 1961.

/s/ Louis M. Foix
Louis M. Foix, Sr., Notary Public in and for
El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF ARIZONA }
COUNTY OF SANTA CRUZ }

On this date appeared before me CONCEPCION AU-
RORA CAGIGAS FRAIJO, who, after being sworn, stated
and deposed as follows:

1. That she is a citizen of Mexico and that she resides at
Dinamarca St. # 137, Nogales, State of Sonora, Mexico.

2. That she has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence by the United States immigration authorities.

3. That she was issued on December 11, 1944 and is possessed of an alien registration receipt card number A7-687-765.

4. That she exercises the right to commute and has been commuting to employment in the United States from the time that she first received her card.

5. That she is employed as a cashier in a local department store and has been working continuously for the same employer.

6. That she is a widow and lives with her elderly mother, also a widow, who owns her home in Nogales, Sonora. That her mother is afflicted with an incurable illness and due to that reason she could probably never be admitted to this country.

/s/ Aurora Cagigas

Affiant, Concepcion Aurora
Cagigas Fraijo.

SUBSCRIBED and SWORN TO before me on this 22nd day of November, 1961.

(SEAL)

/s/ Manuel A. Enciso

Manuel A. Enciso, Notary Public.
My commission expires Dec 2/61.

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me MARIA FELIX CARRERA, who, after being sworn, stated and deposed as follows:

1. That she is a citizen of Mexico and that she resides at 512 Del Arco Street, Cuidad Juarez, State of Chihuahua, Mexico.
2. That she has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.
3. That she was issued on August 9, 1927 and is possessed of an alien registration receipt card, No. A 4388251.
4. That she exercises the right to commute and has been doing so since the 1920's.
5. That she is forelady in charge of a drapery workroom and has been continuously employed by her present employer since 1926.
6. That she resides in Mexico with an elderly aunt of whom she is the sole support.
7. That should she lose the right to commute, this would work a great hardship upon her and her aunt; that the aunt is very old and cannot read or write, and that the aunt could probably never be admitted to this country.

/s/ Maria F. Carrera
Affiant, Maria Felix Carrera

SUBSCRIBED and SWORN TO before me on this 16 day
of November, 1961.

/s/ Louis M. Foix
Louis M. Foix, Sr., Notary Public in and
for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me MANUEL SALVADOS
GUZMAN CASTELLANES, who, after being sworn, stated
and deposed as follows:

1. That he is a citizen of Mexico and that he resides at
837 North Constitution Street, Cuidad Juarez, State of
Chihuahua, Mexico.
2. That he has been granted the status of being an immi-
grant and of having been "lawfully admitted for permanent
residence" by the United States immigration authorities.
3. That he was issued on June 14, 1960, and is possessed
of an alien registration receipt card No. A 10734570.
4. That he exercises the right to communte to the United
States.
5. That he is employed in El Paso, Texas as a machine
operator, and that he is a member of the Amalgamated Tex-
tile Workers of America, AFL-CIO.

6. That he resides in Juarez with his grandmother and his sister, both of whom he is the sole support.

7. That if he were to lose the right to commute, it would result in a great hardship to him and his family; that his grandmother is very old and would not be admitted to the United States and that he cannot support two homes.

/s/ M. S. Guzman C.
Affiant, Manuel Salvados Guzman
Castellanes

SUBSCRIBED and SWORN TO before me on this 20th day of November, 1961.

/s/ Louis M. Foix
Louis M. Foix, Sr., Notary Public in and
for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me VICENTA CONTRERAS (LOZANO), who, after being sworn, stated and deposed as follows:

1. That she is a citizen of Mexico, and that she resides at 783 Honduras Street, Cuidad Juarez, State of Chihuahua, Mexico.

2. That she has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence", after having first obtained a visa and having applied for entry into the United States.

3. That she was issued on November 17, 1952, and is possessed of an alien registration receipt card No. A 8400039.

4. That she exercises the right to commute from her home in Mexico to employment in the United States.

5. That she is employed in El Paso, Texas as an assistant cook, and that she has been employed at the same place for nearly eight years.

6. That she lives with her mother and sister in Juarez and that she is the sole support of her mother who is over 50 years of age and of her sister who is not able to work because of sickness.

7. That the loss of the right to commute would result in grave hardship for her and her family; that in all probability she would not be able to bring her mother and sister into this country, and that she could not afford to maintain a home for them in Juarez and a home for herself in El Paso.

/s/ Vicenta Contreras Lozano
Affiant, Vicenta Contreras (Lozano)

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF ARIZONA }
COUNTY OF SANTA CRUZ }

On this date appeared before me, JUANA RENTERIA DE ALARCON, who, after being sworn, stated and deposed as follows:

1. That she is a citizen of Mexico and that she resides at Libertad St. #11, Nogales, State of Sonora, Mexico.

2. That she has been granted the status of being "law-full admitted for permanent residence" by the United States immigration authorities.

3. That she was issued on July 23, 1928 and is possessed of an alien registration receipt card number A5 906-156.

4. That she exercises the right to commute and has been doing so since the date she was issued her card.

5. That she is a seamstress in a department store and has been continuously employed by her present employer since 1928.

6. That she resides in Mexico with her elderly blind mother of whom she is the sole support.

7. That should she lose the right to commute, this would work a great hardship upon her and her mother; that the mother is very old and being deprived of her sight, she could probably never be admitted to this country.

/s/ Juana R de Alarcon
Affiant, Juana Renteria de Alarcon.

SUBSCRIBED and SWORN to me on this 22nd day of November, 1961.

/s/ M. A. Enciso

Manuel A. Enciso—Notary Public

My commission Expires Dec-2-61.

(SEAL)

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me FRANCISCA DE LA CRUZ, who, after being sworn, stated and deposed as follows:

1. That she is a citizen of Mexico and that she resides on Olmos Street, Colonia el Futuro, Ciudad Juarez, State of Chihuahua, Mexico.
2. That she has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities; and that United States authorities have told her that it is not necessary to have actual residence in the United States to maintain the right to commute.
3. That she was issued on September 11, 1947, and is possessed of an alien registration receipt card No. A 6781881.
4. That she exercises the right to commute to the United States.

5. That she is employed in El Paso, Texas in a clothing factory, and is a member of Amalgamated Textile Workers of America. AFL-CIO.

6. That she resides in Juarez with her mother, who is 85 years of age, and a niece whose mother has died; that she is the sole support of both of them and is sending her niece to school.

7. That it would work a great and severe hardship on her and her family if she were to lose the right to commute because she would be unable to bring her mother into this country, and she would be unable financially to support adequately two homes.

/s/ Francisca de la Cruz

Affiant, Francisca de la Cruz

(SEAL)

SUBSCRIBED and SWORN TO before me this 17th day of November, 1961.

/s/ Louis M. Foix

Louis M. Foix, Sr., Notary Public in and
for El Paso County, Texas

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me FRANCISCO GARCIA, who, after being sworn, stated and deposed as follows:

1. That he is a citizen of Mexico, and that he resides on Republica del Salvador, 484 South, R. 21, Ciudad Juarez, State of Chihuahua, Mexico.

2. That he has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.

3. That he was issued on November 16, 1929, and is possessed of an alien registration receipt card No. A 2978409.

4. That he exercises the right to commute to the United States.

5. That he is employed in El Paso, Texas as a cutter and that he is a member of the Amalgamated Clothing Workers of America, AFL-CIO.

6. That he resides in Juarez with his wife, a very old aunt, and a 15 or 16 year old son.

7. That if he were to lose the right to commute, it would work a great personal and financial hardship on him and his family, for he would be unable to bring those whom he supports to the United States, and he would be unable to support two homes.

/s/ Francisco Garcia
Affiant, Francisco Garcia

SWORN TO AND SUBSCRIBED BEFORE me on this
the 17th day of November, 1961.

Louis M. Foix, Sr., Notary Public in
and for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF ARIZONA }
COUNTY OF SANTA CRUZ }

On this date appeared before me VICENTE VALENZUELA GIL, who, after being sworn, stated and deposes as follows:

1. That he is a citizen of Mexico and that he resides at Calles Vazquez and Jimenez # 272, Nogales, Sonora, State of Mexico.

2. That he has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence by the United States Immigration authorities.

3. That he was issued on July 5, 1929 and is possessed of an alien registration receipt card number A5-886-816.

4. That he exercises the right to commute and has been commuting to the United States since he was issued his card.

5. That he is handy man in a department store of Nogales, Arizona and has been continuously employed by the same concern.

6. That he resides in Nogales, Sonora, with his wife and nine children of whom he is the sole support.

7. That should he lose the right to commute, this would work a great hardship upon him and his family because they own a modest home in Nogales, Sonora that belongs to his wife.

/s/ Vicente V. Gil
Affiant, Vicente Valenzuela Gil

SUBSCRIBED and SWORN to before me on this 22nd day of November 1961.

/s/ Manuel A. Enciso

Manuel A. Enciso—Notary Public

My commission Expires Dec-2-61.

(SEAL)

THE STATE OF ARIZONA }
County of Santa Cruz. }

On this date appeared before me JESUS MARIA GONZALES, who, after being sworn, stated and deposed as follows:

1. That he is a citizen of Mexico and that he resides at Vazquez St. # 230, Nogales, State of Sonora, Mexico.

2. That he has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.

3. That he was issued on July 11, 1927 and is possessed of an alien registration receipt card number A5 876-637.

4. That he exercises the right to commute and has been commuting continuously to employment in the United States from the time that he first received his card.

5. That he is employed as a window trimmer in Nogales, Arizona; that he has been working continuously for the same employer since the time he first received his alien registration card.

6. That he resided in Nogales, Sonora, with his wife, five children and his sister in law and that he is the sole support of this family.

7. That it would work a severe hardship upon him and his family if he were to lose his right to commute.

/s/ Jesus Maria Gonzalez.

Affiant, Jesus Maria Gonzalez.

SUBSCRIBED and SWORN TO before me on this 22nd day of November, 1961.

/s/ Manuel A. Enciso

Manuel A. Enciso—Notary Public

My commission Expires Dec-2-61.

(SEAL)

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me PETRA H. GOMEZ, who, after being sworn, stated and deposed as follows:

1. That she is a citizen of Mexico and that she resides at 1476 Cayoacan, Cuidad Juarez, State of Chihuahua, Mexico.

2. That she has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.

3. That she was issued on September 13, 1951, and is possessed of an alien registration receipt card, No. A 8104421.

4. That she exercises the right to commute to the United States.

5. That she is employed fixing snaps and rivets in El Paso, Texas, and that she has been employed by her present employer for nearly ten years; and that she is a member of the Amalgamated Textile Worker of America AFL-CIO.

6. That she resides in Juarez with her 80 year old mother and two young nephews who are in school. Her economic situation is such that she could not support two homes and she does not believe that she could get her mother admitted to the United States.

7. That if she were to lose the right to commute it would work a great personal and economic hardship on her and her family.

/s/ Petra H. Gomez
Affiant, Petra H. Gomez

SUBSCRIBED and SWORN TO before me on this 17th day of November, 1961.

/s/ Louis M. Foix
Louis M. Foix, Sr., Notary Public in and
for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me CARMEN GOMEZ-MARES, who, after being sworn, stated and deposed as follows:

1. That she is a citizen of Mexico, and that she resides at 126 Francisco Sarabia, Ciudad Juarez, State of Chihuahua, Mexico.
2. That she has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence", after having obtained a visa and effected entry into the United States.
3. That she was issued on January 31, 1956, and is possessed of an alien registration receipt card No. A 10546679.
4. That she exercises the right to commute from Mexico to employment in the United States.
5. That she has worked and is working as a maid in a hotel in El Paso, Texas.
6. That she lives with her mother and sister in Juarez, Mexico; that her mother is past 60, is feeble and sickly and that her sister is going to school; and that she is the sole support of her mother and sister.
7. That if she were to lose the right to commute, it would cause great personal and family hardship; that she could not bring her mother and sister into this country and that

she could not support a home in Juarez and a home in El Paso.

/s/ Carmen Gomez-Mares
Affiant, Carmen Gomez-Mares

SWORN TO and SUBSCRIBED BEFORE me on this day of November, 1961.

/s/ Louis M. Foix
Louis M. Foix, Sr., Notary Public
in and for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF ARIZONA }
COUNTY OF SANTA CRUZ }

On this date appeared before me ADALBERTO LOPEZ, who, after being sworn, stated and deposed as follows:—

1. That he is a citizen of Mexico and that he resides at Mina #229, Nogales, State of Sonora, Mexico.
2. That he has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.
3. That he was issued on June 30, 1924 and is possessed of an alien registration receipt card number A5-920-029.
4. That he exercises the right to commute and has been commuting continuously to employment in the United States from the time that he first received his card.

5. That he is employed as a handyman in Nogales, Arizona; that he has been working continuously for the same employer since the time he first received his alien registration card.

6. That he resides in Nogales, Sonora, with his wife, five minor children and an elderly aunt, who is an invalid.

7. That it would work a severe hardship upon him and his family if he were to lose his right to commute.

/s/ Adalberto Lopez
Affiant, Adalberto Lopez

SUBSCRIBED and SWORN to before me on this 22nd day of November 1961.

(SEAL)

/s/ Manuel A. Enciso
Manuel A. Enciso—Notary Public
My commission expires Dec-2-61.

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me FRANCISCO LOZANO (VOLLEJO), who, after being sworn, stated and depose as follows:

1. That he is a citizen of Mexico and that he resides at 103-115 Colonia Nava, Ciudad Juarez, State of Chihuahua, Mexico.

2. That he has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.

3. That he was issued on April 13, 1955 and is possessed of an alien registration receipt card No. A 8988783.

4. That he exercises the right to commute and has been commuting continuously to employment in the United States from the time that he first received his card.

5. That he is employed as a butcher in El Paso, and that he has been working continuously for one employer since the time that he first received his alien registration receipt card.

6. That he resides in Juarez with his wife and three children and that he is the sole support of this family.

7. That it would work a severe hardship upon him and his family if he were to lose his right to commute.

/s/ Francisco Lozano (Vollejo)
Affiant, Francisco Lozano (Vollejo)

SUBSCRIBED and SWORN TO before me on this 17th day of November, 1961.

/s/ Louis M. Foix
Louis M. Foix, Sr., Notary Public
in and for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me RUBEN NARES (MUNOZ), who, after being sworn, stated and deposed as follows:

1. That he is a citizen of Mexico and that he resides in Zaragosa DB, State of Chihuahua, Mexico.

2. That he has been granted the status of being an immigrant and being "lawfully admitted for permanent residence" by the United States immigration authorities.

3. That he was issued on January 6, 1956 and is possessed of an alien registration receipt card No. A 10545355.

4. That he exercises the right to commute to the United States.

5. That he is employed in El Paso, Texas as a grinder.

6. That he resides in Mexico with his wife and one child, and that he is the sole support of his family.

7. That it would work a great hardship economically for him and his family if he were to lose the right to commute.

/s/ Ruben Nares (Munoz)

Affiant, Ruben Nares (Munoz)

SUBSCRIBED and SWORN TO before me on this 17th day of November, 1961.

/s/ Louis M. Foix

Louis M. Foix, Sr., Notary Public
in and for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me LUCIA PARRA-VASQUEZ, who, after being sworn, stated and deposed as follows:

1. That she is a citizen of Mexico and that she resides at 625 Tlaxcala Street East, Ciudad Juarez, State of Chihuahua, Mexico.
2. That she has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.
3. That she was issued on September 28, 1955 and is possessed of an alien registration receipt card No. A 10536094.
4. That she exercises the right to commute to the United States.
5. That she is employed as a production worker in El Paso in a dress factory and that she is a member of the Amalgamated Clothing Workers of America, AFL-CIO.
6. That she resides in Juarez with her two daughters and her mother and a daughter of her sister, that she is the sole support of each of them; and that it would work a great hardship on her and her family if she were to lose the right to commute because she would be unable to bring them all into the United States and she would be unable to support two homes.

/s/ Lucia Parra-Vasquez
Affiant, Lucia Parra-Vasquez

SUBSCRIBED and SWORN TO before me on this 17th day of November, 1961.

/s/ Louis M. Foix

Louis M. Foix, Sr., Notary Public
in and for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me JOSE JUAN GONZALES ROSAS, who, after being sworn, stated and deposed as follows:

1. That he is a citizen of Mexico and that he resides at 1305 26th Street, Ciudad Juarez, State of Chihuahua, Mexico.
2. That he has been granted the status of being an immigrant and of having been "lawfully admitted for permanent residence" by the United States immigration authorities.
3. That he was issued on December 21, 1959 and is possessed of an alien registration receipt card No. A 11937014.
4. That he exercises the right to commute to the United States.
5. That for the past two years he has been employed as a grinder in El Paso, Texas.

6. That he resides in Juarez with his wife and seven children and that he is the sole support of his family.

7. That if he were to lose the right to commute, he could not afford to bring his family to the United States, nor could he afford to maintain two homes; and that the loss of the right to commute would result in great personal hardship to him and his family.

/s/ Jose Juan Gonzales Rosas
Affiant, Jose Juan Gonzales Rosas

SUBSCRIBED and SWORN TO before me on this 17th day of November, 1961.

/s/ Louis M. Foix
Louis M. Foix, Sr., Notary Public
in and for El Paso County, Texas

(SEAL)

My Commission Expires:
June 1, 1963

THE STATE OF TEXAS }
COUNTY OF EL PASO }

On this date appeared before me ANTONIO TOVAR-RAMIREZ, who, after being sworn, stated and deposed as follows:

1. That he is a citizen of Mexico and that he resides at 2606 Libertad, Ciudad Juarez, State of Chihuahua, Mexico.

2. That he has been granted the status of being an immigrant and of being "lawfully admitted for permanent residence" by the United States immigration authorities.

3. That he was issued on October 13, 1955 an alien registration receipt card and is possessed of that card No. A 10534661.

4. That he exercises the right to commute.

5. That he is employed in El Paso, Texas as a polisher.

6. That he resides in Juarez with his wife and his son and three grandchildren whom his wife takes care of; that he is the sole support of all of them and that the children are in school in Juarez.

7. That it would work a great hardship on him and those whom he supports if he were to lose the right to commute; if he were to suddenly lose the right to commute, he would not be able to bring into the United States all of those whom he supports and he would not be able to maintain two homes.

/s/ Antonio Tovar-Ramirez
Affiant, Antonio Tovar-Ramirez

SUBSCRIBED and SWORN TO before me on this 17th day of November, 1961.

/s/ Louis M. Foix
Louis M. Foix, Sr., Notary Public
in and for El Paso County, Texas

(SEAL)

My Commission Expires
June 1, 1963

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS
SUPPORTING MOTION FOR SUMMARY JUDGMENT***

(Filed October 15, 1962)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME plaintiffs in the above entitled and numbered cause and file this their statement of material facts supporting motion for summary judgment, in accordance with Rule 9 of this United States District Court. Said material facts, with record references noted, are as follows:

1.

Plaintiff Texas State AFL-CIO is a voluntary labor organization composed of affiliated labor organizations operating in the State of Texas (admitted in paragraph 1 of Defendants' Answer).

2.

The individual plaintiffs herein bring this action on behalf of themselves individually (admitted in paragraph 2 of Defendants' Answer), and as representatives of a class of persons who are so numerous as to make it impractical to bring them all before this Court. (The Court may take judicial notice of the United States Census data showing population in the counties of the various states of the United States bordering on Mexico, particularly the border counties of Texas. In addition, Exhibits 1, 2, and 3 of Par-

*Appellants have not printed their Motion for Summary Judgment because it is not before the Court of Appeals for review. The facts supporting said motion, however, are relevant to the motions to dismiss, for the latter motions were filed while plaintiffs' Motion for Summary Judgment was pending and were considered by the trial court together with plaintiffs' Motion for Summary Judgment.

nass deposition show widespread economic impact of "commuting aliens" on the economy of these areas.)

3.

Defendant Robert F. Kennedy is the Attorney General of the United States and maintains his office at the Department of Justice, Constitution Avenue and Ninth Street, N.W., Washington, D. C. As Attorney General, said defendant is charged with the administration and enforcement of the laws of the United States relating to the immigration and naturalization of aliens pursuant to Title 8, U.S.C., §1103(a). He has control, direction, and supervision of all employees and of all the files and records of the Immigration and Naturalization Service of the United States. In accordance with the aforesaid statute he establishes such regulations, prescribes such forms of bond, reports, entries, and other papers, issues such instructions, and performs such other acts as he deems necessary for carrying out his authority under the provisions of Chapter 12 of the Immigration and Naturalization Act (8 U.S.C., §§1101-1503). He is authorized to confer responsibilities and authority for the administration of the Immigration and Naturalization Service to a commissioner, pursuant to Title 8, U.S.C. §1103(b). (Admitted in paragraph 5 of Defendants' Answer.)

4.

Defendant Joseph M. Swing (at the time issue was drawn in this case) was the commissioner of the Immigration and Naturalization Service appointed in accordance with

Title 8, U.S.C. §1103(b). The commissioner offices in Washington, D. C. at the Department of Justice. Said official is charged with the responsibility and authority of the administration of aforesaid Chapter 12 (Immigration and Naturalization Act) which have been conferred upon him by the Attorney General. (Admitted in paragraph 6 of Defendants Answer.)

5.

On July 8, 1960, the Honorable Luther Youngdahl, United States District Judge of the United States District Court for the District of Columbia rendered an opinion in this Court in *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. William P. Rogers and Joseph M. Swing*, Civil Action No. 3630-59 (admitted in paragraph 8 of Defendants Answer).

6.

On February 15, 1961, this same United States District Court, by Order of Judge Leonard P. Walsh, granted plaintiff's motion for summary judgment in said case No. 3630-59, except in so far as certain mandatory or injunctive relief was sought by the said plaintiff. Defendants admit that the said Order is now a final judgment therein as no appeal was prosecuted, and admit that the defendant Swing was a defendant in Civil Action No. 3630-59. (Admitted in paragraph 9 of Defendants' Answer.)

7.

Notwithstanding the declaration of law contained in this Court's ruling in the aforesaid *Amalgamated Meat Cutters*

case (Civil Action No. 3630-59), defendants have continued to confer the status of "aliens lawfully admitted" for permanent residence" upon commuting aliens. They further admit that they have continued to recognize commuters as having the status of aliens lawfully admitted for permanent residence. (Admitted in paragraphs 10 and 11 of Defendants' Answer.)

8.

Defendants admit that they have knowingly permitted the entry of alien commuters having the "status of aliens lawfully admitted for permanent residence under the Immigration and Nationality Act of 1952." (Admitted in paragraph 17 of Defendants' Answer.)

9.

The entire Parnass deposition,* with exhibits attached thereto, is relied upon in support of motion for summary judgment. The following are excerpts from such exhibits, but reliance is not limited to the quoted material. References in the following numbered paragraphs are to the exhibits to said deposition, plaintiffs' Exhibit 1 being the report of the Laredo, Texas, investigation, plaintiffs' Exhibit 2 being the report of the El Paso, Texas, investigation,

*Deposition of Larry Parnass, attorney employed by the United States Department of Labor and designee of the Secretary of Labor, "who has knowledge of investigations and reports made by the United States Department of Labor in cities of El Paso and Laredo, Texas, and other border areas relating to the problem of commuters living in Mexico and working in the United States, which investigations and reports were made during the period September, 1959 through the summer of 1961." Stipulation, pp. 4-5 of Parnass deposition filed herein. Said reports are attached as exhibits to the deposition and are referred to and quoted from in paragraphs 9 through 33 of Plaintiffs' Statement of Material Facts Supporting Motion for Summary Judgment.

plaintiffs' Exhibit 3 being the report of the El Paso, Texas, investigation in connection with the Peyton Packing Company strike. All of said reports are fully identified in the Parnass deposition; pages noted are to the respective exhibits.

10.

"Survey of data collected by the Laredo local office of the Texas Employment Commission shows that as of June 1, 1961, a total of 2,662 persons in the Laredo labor market were unemployed for a high percentage rate of 11.32 * * * it can be definitely concluded that the vast majority of unemployed persons, as well as applicant's are members of the domestic labor market." (Pl. Ex. 1, pp. 2, 3, and 4.)

11.

"No figure is available as to the exact number of Mexican alien commuters holding jobs in Laredo, which in itself is indicative of the need for more rigid Governmental enforcement and control of the commuter situation in this border community. However, this investigation disclosed that of the approximate 3,000 persons employed in the firms contacted during the survey, 438 or better than 15% of them are Mexican Nationals residing in Nuevo Laredo and commuting to work daily in Laredo, Texas. Since the total work force in Laredo approximates 23,000, by using the percentages and figures last cited as to the ratio of employment between domestics and alien commuters in the firms contacted during this investigation, we can estimate that the total commuter work force approaches 3,000 persons. This figure appears conservative in view of the estab-

lished practice by alien workers furnishing Laredo, Texas addresses to employers and governmental officials and posing as residents of this country when they, in fact, live in Mexico and are a part of the commuter work force." (Pl. Ex. 1, pp. 8 and 9.)

12.

"In the menial jobs, particularly in the hotel and restaurant industries, the alien commuters are employed extensively at wage rates, in some instances, so low as to be symbolic of peonage. The wages paid these workers in the semi-skilled and skilled classifications, such as, but not limited to, sales, clerical and stenographic seem relatively low and in specific situations are substantially below those paid to domestic workers performing exactly the same activity under the same or similar hours and conditions of employment in the same establishment." (Pl. Ex. 1, p. 13.)

13.

"* * * it seems reasonable to conclude that employers in this area prefer the alien commuter because he will work for less wages than will the domestic. Such a conclusion is contra to the explanation offered by those employers who, in effect, stated that their preference for the alien was largely grounded on the factors of reliability and dependability." (Pl. Ex. 1, p. 14.)

14.

"Employer preference for the alien commuter seems to be based on his willingness to accept and work for low wages." (Pl. Ex. 1, p. 16.)

15.

"Without exception where comparative wage rate information is available, it is clear that the domestic cook working at the establishment where alien commuter labor is employed either in this or other occupations or both earns less than does the domestic cook employed by the hotel which does not, in any respect, utilize the services of alien commuter workers." (Pl. Ex. 1, p. 27.)

16.

"* * * the employment of the alien commuter worker, at least in the hotel industry, has the effect of depressing wages of the domestic employed in the same establishment * * *." (Pl. Ex. 1, p. 34.)

17.

"* * * Since the domestic worker's ability to bargain for better rates is of necessity affected by the commuter's willingness to work for lower rates, it seems to us that there is definite evidence of 'adverse effect' here." (Pl. Ex. 1, p. 51.)

18.

"* * * wages paid to office employees in this general area are relatively lower than those paid to the same type of workers in the other areas of the State * * *." (Pl. Ex. 1, p. 66.)

19.

"There is definite evidence, particularly in the clerical classifications, that the alien worker is willing to work for

low wages and thus causes the domestics to work at the same low scale * * *." (Pl. Ex. 1, p. 68.)

20.

"Extensive employment of alien commuters in *secretarial, clerical and stenographic* positions is shown at apparent low wage rates." (Pl. Ex. 1, pp. 83 and 84.)

21.

Sample wages shown by survey:

Hotels

Hotel maids	\$60 per month
Hall boys (Pl. Ex. 1, p. 28)	\$20 per week for 96 hr. week
Bus Boys (Pl. Ex. 1, p. 30)	\$40 per month and meals

Drug and Related Establishments

Cashiers	\$25 per week
Fountain Girls (Pl. Ex. 1, pp. 47-48)	\$10.32 to \$21 per week

Grocery Stores

Checkers	\$17 per week
Warehouses	\$22 and \$30 per week
Assistant Bakers (Pl. Ex. 1, p. 54)	\$21 per week

22.

"No exact figure is available with respect to the number of Juarez domiciled aliens holding jobs in El Paso. However, at the time of the *Peyton Packing Company* investigation, local officials of the Immigration and Naturalization Service estimated the number of approximate 10,000. In the course

of the April 1961 survey, it was calculated that between 15,000 and 25,000 Juarez residents commute daily from Juarez to El Paso for many purposes and that a large percentage of such persons, in fact, crossed daily to work in various business establishments on the American side." (Pl. Ex. 2, pp. 2 and 3.)

23.

"It is reflected from the facts obtained in these surveys that the commuter alien worker is employed in substantially all types of industries in the El Paso employment area." (Pl. Ex. 2, pp. 4 and 5.)

24.

"As of June 1, 1961, the number of insured unemployed El Paso workers, according to the data on file in the El Paso local office of the Texas Employment Commission, totaled 5,550." (Pl. Ex. 2, p. 11.)

25.

"It is abundantly clear from the above schedule [data in report] that a substantial number of domestics are available for jobs filled by the Mexican alien commuter workers in the occupations and industries included in these investigations." (Pl. Ex. 2, p. 13.)

26.

"Approximately 7,150 persons are now available for jobs in the El Paso area.

"a. Of the 7,150 figure, a vast majority are domestic workers having American citizenship and residence.

"b. 5,550 of the total applicants are unemployed insurance claimants.

"c. As to a substantial number of applicants, it can be presumed that they are available, able, qualified and willing to work in the various occupations and industries in which alien commuter workers are now employed.

"d. Availability of domestic workers is clearly shown in those classifications in which there is a heavy concentration of Mexican workers.

"Commuter alien workers are used most extensively in the principal area of employment.

"a. At least 10,000 of these Juarez domiciled aliens hold jobs in El Paso.

"b. It is not unlikely that a greater number than 10,000 of the alien commuters are actually employed in El Paso because of the practice of falsely giving El Paso addresses." (Pl. Ex. 2, pp. 18 and 19.)

27.

"All five of the eating establishments surveyed employ alien commuter labor * * *. The domestic employee receives approximately the same wages as does the alien commuter engaged in the performance of the same work in the same establishment. This apparent disclosure coupled with the evidence of the use of the alien commuter in the lower paid classification may constitute evidence of 'adverse effect' since the domestic workers' ability to bargain for better wages is of necessity affected by the commuter workers' willingness to work for lower rates." (Pl. Ex. 2, pp. 36 and 37.)

28.

"* * * that the willingness of the commuter alien to work for possibly substandard wages necessarily impairs the domestic power to bargain for better rates." (Pl. Ex. 2, p. 42.)

29.

"From the above schedule [in report] it is obvious that in all instances, the domestic warehouseman at the establishment using both domestic and alien commuter workers receives less wages than does the domestic employed in the non-integrated employee firm." (Pl. Ex. 2, p. 50.)

30.

"(3) Based on (1) and (2) above, [data in report] a conclusion might be appropriate, to the effect, that the willingness of the alien commuter to work for such low wages forces the domestic similarly situated to accept the same wages and of necessity impairs his opportunity to bargain for a better compensatory rate." (Pl. Ex. 2, pp. 53 and 54)

31.

"Domestic laundry workers, who are applicants registered with the Texas Employment Commission apparently would not accept the wages paid to the commuter-alien by certain employers." (Pl. Ex. 2, p. 63.)

32.

"As to general labor work in factories, it is not unlikely the domestic applicant would not accept the general wage rates paid to alien commuters." (Pl. Ex. 2, p. 64.)

33.

"The Immigration and Naturalization Service recently conducted a survey at the El Paso-Juarez crossing which showed 'that the number of aliens coming to work locally in El Paso from Juarez is 9,899 daily.' * * * The foregoing figures were quoted as substantially correct by Marcus Neeley, District Director, Immigration and Naturalization Service, El Paso, Texas, in an interview with the representative of this office and Mr. James E. Hammond, Assistant United States Attorney in Charge, El Paso, Texas. In addition, Mr. Neeley stated that a very substantial number of aliens, giving El Paso addresses and who purport to live in El Paso, but may not do so, had been admitted under the Statute in question to work in El Paso. Mr. Neeley at this time did not have at his disposal an exact count of those aliens who purport to permanently live in El Paso. The reference by Mr. Neeley to the above cited figures seemed to be made, in part to emphasize the widespread practice of admitting alien labor to work in the United States and the actual utilization of such labor by the various El Paso Industries. * * *

"Based upon interviews with all parties concerned, representatives of the Union, and the employer, Mr. Neeley, Mr.

Hammond and Mr. Wandt, it was readily apparent that the employment of aliens in the El Paso, Texas area is an important and integral part of that as well as other border communities' economic structure. * * * (Pl. Ex. 3, pp. 17 and 18.)

Respectfully submitted,

MULLINAX, WELLS, MORRIS & MAUZY
1601 National Bankers Life Bldg.
Dallas 1, Texas

By /s/ Charles J. Morris

Charles J. Morris

J. ALBERT WOLL
736 Bowen Building
Washington 5, D. C.

INTERVENERS' MOTION TO DISMISS

(Filed November 5, 1962)

Interveners move the court to dismiss the above action on the following grounds:

I

The complaint fails to state a claim upon which relief can be granted in that the court is without jurisdiction because the complaint presents a political and not a justiciable question.

II

The complaint fails to state a claim upon which relief may be granted in that the court is without jurisdiction because a justiciable controversy or case is not shown by the complaint and because Plaintiffs are without standing to sue.

III

The complaint fails to state a claim upon which relief can be granted because assuming *arguendo*, but not admitting, that the court has jurisdiction the court should, in its discretion because of the consequences of the desired relief, refuse to take jurisdiction to entertain a suit for declaratory judgment or for mandamus.

CHAPMAN AND FRIEDMAN
Attorneys for Interveners

/s/ Martin L. Friedman

Martin L. Friedman

/s/ Michael J. Shea

Michael J. Shea

/s/ Paul A. Lenzini

Paul A. Lenzini

GOVERNMENT DEFENDANTS' MOTION TO DISMISS

(Filed November 6, 1962)

Come now the Government defendants by their attorney, the United States Attorney for the District of Columbia, and respectfully move the Court to dismiss this action on the following grounds:

I. *The Court lacks jurisdiction over the subject matter, in that,*

(A) Plaintiffs lack standing to sue;

(B) Plaintiffs' action otherwise fails to present a "case or controversy", since plaintiffs seek an advisory opinion from the Court on an abstract question of law; and

(C) The litigation here essentially involves the making of a determination entirely committed to agency discretion and made judicially nonreviewable by statute.

II. *In any event, even assuming arguendo there is jurisdiction, the Court should, in the exercise of a sound judicial discretion, abstain from entertaining jurisdiction in equity or mandamus proceedings here,*

considering that,

The litigation here necessarily involves sensitive foreign affairs considerations and a decision adverse to the Government would have a seriously deleterious effect upon the foreign relations of the United States.

Incorporated herein and made a part hereof by attachment are the following: A certification in affidavit form executed by the Secretary of State, identified as Government

Exhibit "A"; and excerpts from the deposition dated May 17, 1962 of Larry Parnass, a Department of Labor attorney, identified as Government Exhibit "B".

Also incorporated herein and made a part hereof by reference are the affidavits of the intervenor defendants, annexed to their answer to the complaint.

In support hereof, the Government defendants herewith submit a memorandum of points and authorities.

/s/ David C. Acheson

DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan

CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon

JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman

GIL ZIMMERMAN
Assistant United States Attorney

(Exhibit A)

AFFIDAVIT OF HONORABLE DEAN RUSK

1. I am the Secretary of State of the United States. Among my responsibilities, subject to direction of the President, is the conduct of relations between the United States and Mexico. I make this affidavit in connection with this action and in response to the issue of foreign relations which has been raised by plaintiffs' complaint, and in particular by paragraph 22 thereof.

2. In my judgment the present practice with regard to commuters across the United States-Mexican border contributes to the friendly relations between the United States and Mexico. The Government of Mexico has also undertaken to explore with the United States Government formulas that would make it possible to find a satisfactory solution for the future to the problem which gives rise to this litigation. Negotiations looking to such a solution are presently in progress. In my judgment, a sudden termination of the commuter system as the result of a court decision would have a serious deleterious effect upon our relations with Mexico.

3. One of the conditions of good relations between the United States and Mexico is the maintenance of a flow of persons and goods across the United States-Mexican border. Because of the considerable freedom of movement in both directions across the border, strong and mutually beneficial economic relations have developed over the years along the border. In a very real sense, the cities along the border—for example, El Paso and Juarez, Eagle Pass and Piedras

Negras, Laredo and Nuevo Laredo, Brownsville and Matamoros, and San Diego and Tijuana—have grown into single economic communities. A disruption in the life of these communities would do real harm to good neighbor relations in the area.

4. The purchases by Mexican nationals of American goods on the United States side of the border constitute a major portion of retail sales on the United States side of the border. If as a result of a substantial reduction in the commuter traffic across the border between Mexico and the United States, a significant number of Mexican nationals would be deprived of their earning power, the trade between the two countries along the border would be substantially reduced. We could expect that this would have an immediate depressing effect on the economy of the region on both sides of the border. Moreover, the loss of gainfull employment and dollar earnings by 30,000 to 50,000 Mexican nationals, estimated at about \$50 million annually, might compel the Government of Mexico to consider compensating steps, which would do further damage to the economic life of the region.

5. Because of the size and influence of Mexico in Latin America, the success of the Alliance for Progress will depend in large measure on the achievement of this program in Mexico. The harm to United States-Mexican relations which I believe would be the result of a termination of the commuter practice could seriously jeopardize the Alliance for Progress in Mexico, and thus in all Latin America.

6. The present practice with regard to commuters is in effect not only at the border between the United States and Mexico, but also at the border between the United States and Canada. The Government of Canada, like the Government of Mexico, has expressed its concern over the present litigation, and an adverse decision could also adversely affect our relations with Canada and the status of United States nationals and property employed in that country.

7. For the above reasons it is my opinion that a judgment on the merits in this case would be undesirable from the standpoint of the foreign relations of the United States. A decision which resulted in a sudden change in the commuter practice at our borders would adversely affect our relations with Mexico, with Canada, and perhaps with other nations of the Western Hemisphere.

/s/ DEAN RUSK

Dean Rusk

Subscribed and sworn to before me
on the 5th day of November, 1962.

Helen Drugan
Notary Public
in and for the District of Columbia
My commission expires 10/31/63.

(Exhibit B)

EXCERPTS FROM DEPOSITION OF
LARRY PARNASS, ATTORNEY, DEPARTMENT
OF LABOR DATED MAY 17, 1962

* * * * *

(p. 29) MR. MORRIS: In an off-the-record discussion, Mr. Al Misler, who has not previously been identified in this record, made a statement which I think may be made the subject of a stipulation.

Would you make that statement again, Mr. Misler, and identify yourself?

MR. MISLER: I am Albert D. Misler, Assistant Solicitor of Labor.

With respect to the last question asked by Mr. Morris, the Secretary of Labor has not delegated to anyone the authority to make certifications required under section 212(a)(14) of the Immigration and Nationality Act, and no one can act on his behalf.

(p. 30) MR. MORRIS: May we accept that as a stipulation?

MR. HANNON: We will agree that it is a stipulation between plaintiffs and defendants * * *.

* * * * *

(p.59) Examination [of Deponent] by Counsel for
Intervenors

BY MR. SHEA:

* * * * *

(p. 60) Q As a result of your investigations of employment in El Paso and Laredo, did the Secretary of Labor issue a certificate under the authority of section 212(a) (14) of the United States Code?

A I'm sorry. I didn't understand you.

Q On the basis of your investigations of the El Paso and the Laredo employment situations—

A No, he did not.

MR. SHEA: I have no further questions.

Further Examination [of Deponent] by Counsel for
Plaintiffs

BY MR. MORRIS:

Q So far as you know, the matters raised in Plaintiffs' Exhibits 1 and 2, relating to El Paso and Laredo, are still pending before the Secretary of Labor?

A I don't know.

Q In other words, you have no knowledge one way or the other?

A I don't have any knowledge.

Q You have no knowledge that the Secretary has refused or intends to refuse to issue any character of action based upon those two reports?

A I don't know.

* * * * *

**INTERVENERS' STATEMENT OF GENUINE ISSUES
IN OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT
(Filed February 1, 1963)**

Comes now Interveners by their attorneys in the above-entitled cause and file this their "statement of genuine issues" in opposition to Plaintiffs' motion for summary judgment, in accordance with Rule 9(h) of the United States District Court for the District of Columbia. While the greater part of both the complaint and the Plaintiffs' statement of material facts contains matter in the nature of legal argument and conclusion, the material facts which are necessary for Plaintiffs to make out their case on motion for summary judgment are in dispute so as to preclude Plaintiffs from being granted relief by way of summary judgment.

1.

The individual Plaintiffs herein, according to the complaint (par. 4), bring this action on behalf of themselves individually and as representative of a class of persons so numerous as to make it impracticable to bring them all before the court. It is added that the individual Plaintiffs are representative both geographically and by occupation of the class or group whom they represent. These allegations, without more, are plainly inadequate to establish the existence and characteristics of a class so as to entitle the individual Plaintiffs to act in a representative capacity in this cause. Without a clearer definition of the class said to be represented, it will not be possible to know whether an adequate representation will be extended. Furthermore, Plain-

tiff Union, according to the complaint (par. 3), brings this action in its representative capacity on behalf of its members and the members of organized labor affiliated with said Plaintiff, directly or indirectly. In light of the fact that members of the Plaintiff Union have intervened in this action as defendants in opposition to the Union, it is submitted that there is a dispute of fact as to the capacity in which Plaintiff Union brings this suit.

2.

Perhaps the most important issue in the instant cause, aside from the numerous threshold questions of law which militate against the position of Plaintiffs and their request for summary judgment, is that of the alleged overall adverse economic impact of the commuter program. In this regard, Plaintiffs rely on certain exhibits which form a part of the deposition of one Larry Parnass, Labor Department Attorney. We are concerned here with the material facts numbered 9 through 33 inclusive in Plaintiffs' Statement of Material Facts Supporting Motion for Summary Judgment. Succinctly stated, it is Interveners' position that the court can not consider these matters on motion for summary judgment. All the recited material facts numbered 10 through 33 are verbatim quotes from reports written by Larry Parnass of inquiries made by Department of Labor employees as to labor conditions in El Paso and Laredo, Texas. Deponent Parnass, testifying with reference to these reports, indicated that he had no personal knowledge of the primary facts on which the conclusions set forth in the exhibits were based

(deposition, 24, 52) and that his role was one of legal adviser (deposition, 9). Since Parness had no personal knowledge as to the facts set forth in the exhibits, the exhibits would be inadmissible in evidence and accordingly are not proper material for consideration by the court on motion for summary judgment. 6 *Moore* § 56.11[4], 2076. Furthermore, even if the reports were admissible, they are subject to interpretation and dispute. What little purpose they could serve is frustrated further by the fact that the information contained in the reports is no longer current. The deposition and exhibits are an improper and clearly questionable source for establishing the proposition that the commuter program has rendered an adverse economic blow to the border area.

3.

In addition to the genuine issue of fact existing as to the matter of whether the commuter program is the proximate cause of economic depression in the border area, there is also the issue as to the causal relation between the commuter program and the allegations of damage particular to the Plaintiffs, viz., that individual Plaintiffs have been unemployed for various periods during 1960 and 1961 as a result of the commuter program (complaint, par. 19); that members of organized labor represented by Plaintiff Texas State AFL-CIO have suffered and are suffering unemployment as a result of the commuter program (*id.*, par. 20); that wage rates are low because of the commuter program (*id.*, par. 20); that American strike activity is prevented and discour-

aged because of the commuter program (*id.*, par. 21); and that animosity is created between the United States and the Republic of Mexico (*id.*, par. 22).

Wherefore, Intervenor urge that due to the existence of the above-mentioned disputed issues of material fact, Plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,
CHAPMAN AND FRIEDMAN
Attorneys for Interveners

/s/ Martin L. Friedman

Martin L. Friedman

/s/ Michael J. Shea

Michael J. Shea

/s/ Paul A. Lenzini

Paul A. Lenzini

**GOVERNMENT DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT AND OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

(Filed February 8, 1963)

Come now the Government defendants (hereinafter "defendants") by their attorney, the United States Attorney for the District of Columbia, and—in the event the Court reaches the merits for purposes of decision—

1. Cross-move the Court to grant defendants summary judgment on the ground that there is no issue as to any fact material to their motion for summary judgment, and defendants are entitled to judgment as a matter of law; and

2. Oppose plaintiffs' motion for summary judgment on the following grounds:

(A) The Court lacks jurisdiction over the subject matter;

(B) Alternatively, the equity abstention doctrine urged in their motion to dismiss clearly warrants the Court to dismiss this action summarily, in the sound exercise of judicial discretion, without reaching the merits;

(C) Assuming the Court may properly reach the merits here, defendants—not plaintiffs—are entitled to judgment on the merits as a matter of law; and

(D) There are in dispute the following issues of fact, in any event barring the grant of summary judgment to plaintiffs in the present posture of this litigation:

(i) The material issue whether there is in fact any direct causal relationship whatever between, on the one hand, the Government's action, of which plaintiffs complain, in permitting alien commuters continued entry to the United States as immigrants

previously lawfully admitted to the United States who have "the status of having been lawfully accorded the privilege of residing in the United States as an immigrant in accordance with the immigration laws, such status not having changed," and, on the other hand, the personal economic injuries plaintiffs assert in their complaint; and

(ii) (If deemed material by the Court) the issue whether such Government action of which plaintiffs complain here causes "animosity between the United States and its good neighbor Mexico" as alleged by plaintiffs.

In support hereof, defendants submit a Statement of Material Facts and a Memorandum of Points and Authorities. In addition, defendants submit a Statement Pursuant to Local Rule 9(h) in Opposition to Plaintiffs' Statement of Material Facts.

/s/ David C. Acheson

DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan

CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon

JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman

GIL ZIMMERMAN
Assistant United States Attorney

**GOVERNMENT DEFENDANTS' STATEMENT OF
MATERIAL FACTS IN SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT**

(Filed February 8, 1963)

Government defendants adopt as their Statement of Material Facts the facts as set forth in the memorandum of points and authorities they filed in support of their motion to dismiss, at pp. 1-20, under the following headings:

(A) Introduction.

(B) The Facts.

(C) Background and History of the Alien Commuter Border Accommodation.

(D) Background and History of the Procedure for Secretary of Labor Certification under Section 212(a) (14) of the Immigration and Nationality Act.

/s/ David C. Acheson

DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan

CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon

JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman

GIL ZIMMERMAN
Assistant United States Attorney

**GOVERNMENT DEFENDANTS' STATEMENT
PURSUANT TO LOCAL RULE 9(h) IN OPPOSITION TO
PLAINTIFFS' STATEMENT OF MATERIAL FACTS**

(Filed February 11, 1963)

Come now Government defendants (hereinafter "defendants") by their attorney, the United States Attorney for the District of Columbia, and make this Statement Pursuant to Local Rule 9(h), in opposition to plaintiffs' Statement of Material Facts:

The genuine issues are as set forth in paragraph 2(d) of our Opposition. That statement is adopted here by reference, with the qualification that in defendants' view the issue set forth in paragraph 2(d) (ii) is immaterial.

And with specific reference to the paragraphs of plaintiffs' Statement of Material Facts, defendants aver as follows:

Pars. 1-3. Defendants take no issue with the statements in these paragraphs.

Par. 4. Raymond F. Farrell, Commissioner of Immigration and Naturalization, has been automatically substituted as defendant in place of former Commissioner Swing, by operation of Rule 25(d), F.R.C.P., as amended.

Pars. 5-7. The statement in paragraph 7 to the effect that defendants continue to recognize alien commuters as entitled to the status of "having been lawfully accorded the privilege of residing in the United States as an immigrant in accordance with the immigration laws, such status not having

changed" is correct; all other matters stated in these paragraphs are immaterial.

Pars. 9-33. The Parnass deposition is completely inadmissible as hearsay; the statements in these paragraphs are not admitted; the inquiries referred to therein were preliminary in nature; and all the factual conclusions or inferences drawn in these preliminary inquiries are genuinely in dispute.

/s/ David C. Acheson

DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan

CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon

JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman

GIL ZIMMERMAN
Assistant United States Attorney

TEXAS STATE AFL-CIO REPLY TO
DEAN RUSK AFFIDAVIT

(Filed March 11, 1963)

Government defendants have filed an affidavit of the Honorable Dean Rusk, Secretary of State. Such affidavit has no place in this lawsuit, for it is not evidentiary as to any of the legal issues. Although we have already commented in our brief as to that affidavit, we add this memorandum to our reply.

The affidavit states that negotiations looking to a solution to the "problem" are presently in progress. In other words, there is recognition that a "problem" exists.

The affidavit also states the following:

"In my judgment the present practice with regard to commuters across the United States-Mexican border contributes to the friendly relations between the United States and Mexico."

Plaintiffs challenge that conclusion. The commuter practice has certainly not aided friendly relations with Mexico. The workers living on this side of the border do not feel friendly toward a practice which deprives them of jobs and decent wages.

On the other hand, plaintiffs have never advocated closing the border. We simply ask that the law be correctly applied and if it is then still necessary for the United States to provide economic assistance to the other side of the border, let it be done in a manner which will not place the entire burden on the working people of a few Texas counties. The 1958 Immigration and Naturalization Act has provisions for use of temporary alien labor under adequate safeguards, but these provisions are presently being ignored in favor of the unregulated traffic in commuters.

The working people of Texas do not agree with Secretary Rusk's conclusions. If Secretary Rusk is aware of the true facts, we hope that he will modify the position expressed in his affidavit.

Some of the facts and a sample of prevailing public opinion are illustrated by the three items attached hereto:

Appendix A: Excerpt from television newscast dated December 29, 1962.

Appendix B: News story appearing in Corpus Christi Caller (Corpus Christi, Texas) dated February 9, 1963.

Appendix C: Editorial appearing in the Corpus Christi Caller dated February 12, 1963.

Plaintiffs submit that these news items reflect the feeling of most of the people in Texas who are concerned with this problem. We realize they are not legal evidence, and we do not submit them as such. They are submitted in the same fashion as an economic brief, but would not have been submitted at all except that government defendants have filed the affidavit of the Secretary of State, which, despite its sincerity, is nevertheless a conclusionary and hearsay statement, and although it has no legal effect, it could perhaps have a prejudicial effect.

Respectfully submitted,

TEXAS STATE AFL-CIO

By /s/ Charles J. Morris

Charles J. Morris

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Dallas 1, Texas

J. ALBERT WOLL

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Washington, D. C.

APPENDIX A

(Excerpt from the Texas News
Saturday, December 29, 1962)

(Television Newscast Station WBAP Fort Worth, Texas)

COMMUTER PROBLEM

A commuter problem threatens to squeeze the economic life from Laredo and other towns and cities along the Texas-Mexican border. The commuters are some 50-thousand Mexicans, who live in Mexico, but work in Texas. They cross over the border bridges, armed with green identification cards, earn their money in Texas, then return to Mexico at the end of the work day. The Texas AFL-CIO, and 189 citizens of border towns, have filed suit against the U. S. Attorney General and the Immigration and Naturalization Service, asking that this practice be stopped. The suit will be heard January 15th. The citizens claim unemployment in the border towns is a direct result of job competition from these commuters. There is no estimate of the number of commuters employed in the Laredo construction business, but union officials claim the number is too high. One labor leader says the commuter will work for one-fourth the pay of a union member.

Because of its comparative remoteness, Laredo has no great concentration of heavy industry. Jobs are scarce enough, without competition from the commuters. And residents of Laredo are miffed because commuters pay no city taxes.

Nuevo Laredo, across the border, is a typical tourist town, with the emphasis on curio shops, night clubs, and other businesses, designed to bring in a flow of yankee dollars. The owners of these businesses live in modest, and sometimes lavish, homes and apartments. Their income compares favorably with that of businessmen across the border.

Unfortunately, everyone in Nuevo Laredo does not own a curio shop or nightclub, and the unskilled and uneducated live in poverty. Unemployment is high, and it's only natural that the unemployed seek jobs across the border. These commuters hold down jobs that normally would be held by their counterparts in Laredo, which also has its share of sub-standard housing. The Bureau of Census designates Laredo as the poorest city in the United States, despite the fact that it is the largest port of entry on the entire border, for goods moving into the United States. Laredo also is the biggest entry point for tourists entering Mexico from Texas.

In North Laredo stands a monument to the city's plight, the warehouse of the Central Welfare Agency. Between 12 and 15 thousand persons are regular candidates for surplus food, made available by the federal government. Most of these persons are migrant farm workers. A South Texas labor leader is asked to comment on the pending suit, and what he hopes the suit will accomplish.

SOUND ON FILM TILL END

* * * * *

APPENDIX B

CORPUS CHRISTI CALLER

Rio Grande Valley News

Corpus Christi, Texas, Saturday, February 9, 1963

BORDER ECONOMIC DRAG
BLAMED ON BUSINESSES

Caller-Times News Service

BROWNSVILLE—A Catholic priest Friday attributed much of the "economic plight" of thousands of his parishioners to what he termed the "business practices" in the community.

The Rev. Joseph O'Brien, OMI, assistant pastor of Our Lady of Guadalupe, the largest Catholic parish in Brownsville, said, "The problem of welfare here is an artificial one—it is forced poverty because of the lack of job availability."

This unavailability of jobs, he said, "results from the practice of the business community in hiring alien labor who hold resident papers but reside in Matamoros where the cost of living is considerably lower than here."

Below Minimum Wages

The assistant pastor of the 35-year-old church, which has 15,000 members, said that in addition, "Many of those who do have jobs here are paid below minimum wages."

He said he knows of many family men who earn "as little as \$15 weekly."

"If people knew that on the national level, we'd be scoffed at," he added.

The priest first spoke publicly on his beliefs regarding local and countywide welfare conditions during recent Cameron County Commissioners Court discussions on a proposal to adopt the U.S. Department of Agriculture (USDA) surplus food program.

The program, which county commissioners decided late last month to adopt on a 60-day trial basis, "is only a stop-gap," O'Brien said.

'Big Purpose'

"Our big purpose should be to develop a moral consciousness among our businessmen to induce them to give the job opportunities to American citizens," he said.

The over-all welfare problem, he said, "is basic; however, therefore, it becomes the responsibility of the whole community and not just a few."

O'Brien said he believes the community is "substantially sound financially. We have a good economy; however, it doesn't function. It could be described as a constipated economy; the money comes in at certain levels, but does not circulate throughout the community to help all the people.

"Many of these people who need welfare right now are productive people who could work if given the opportunity. Many people say welfare will destroy initiative—well I say

unrealistically low wage levels are the real destroyer of initiative."

First Step

Stopping the practice of hiring commuter labor from Matamoros, the priest said, "would be the first step in solving the dire need of so many of our people, whose living conditions should be of first interest to us."

The next step, he said, "would be for our businessmen to pay the minimum wage of \$1.15 an hour adopted in 1961."

The amendment to the wage-hour law, which became effective in September, 1961, extended minimum wage coverage to employees in five categories of enterprises in interstate commerce or in the production of goods for interstate commerce.

At the time the new minimum wage was adopted, a Rio Grande Valley spokesman for the U.S. Department of Labor, Wage and Hour Division, estimated that several hundred workers in the Brownsville area would be affected by the new law, primarily in the shrimp industry, which is seasonal work, and in some retail stores.

Ruling Expected

In regard to the practice of hiring nonresident alien workers, a ruling on a motion for a summary judgment in a labor union suit to bar the practice is expected sometime this month.

The Texas AFL-CIO and 189 U.S. residents of Texas border cities last year filed the lawsuit against U.S. Atty. Gen. Robert F. Kennedy and Commissioner Joseph M. Swing of the U.S. Immigration and Naturalization Service.

The suit, according to union spokesmen, seeks to order Kennedy and Swing to keep nonresident aliens from Mexico from "illegally" commuting daily across the U.S.-Mexico border to jobs in the United States. It is not aimed at closing the border to legal immigrants, labor leaders said.

O'Brien said he believes this practice of hiring nonresident alien workers by area businessmen "results in the employer hurting his own community." The commuter, he said, "does not pay city or county or school taxes."

'Serious Effect'

A sudden termination of the commuter system as a result of the court decision, "would have a serious effect upon our relations with Mexico," Secretary of State Dean Rusk was quoted as saying last November.

Rusk said that Mexicans earn about \$50 million a year on the U.S. side and that Mexico might be prompted to consider "compensating steps" which would do "further damage to the economic life of the region."

Neighboring Texas and Mexico cities along the border have developed into single economic communities under the commuter visa system, with Mexicans accounting for a major portion of retail sales in the U.S. border cities, according to Rusk.

Of Business Opposition

Also opposing the disturbance of the commuter system are many Brownsville businessmen, who believe the economic life of Brownsville is intimately tied to that of its neighboring Mexican city of Matamoros.

According to Antonio J. Bermdez, director of Mexico's National Frontier Program, 3,500 Matamoros citizens are working in Brownsville or adjacent communities.

O'Brien said, however, that he believes "our first moral responsibility is to our people, who have a right to work, a right to a living wage when they work, a right to their own productivity and to the fruits of that productivity."

APPENDIX C

CORPUS CHRISTI CALLER — Editorial

Feb. 12, 1962

CITIZENS DUE EMPLOYMENT
PRIORITY IN BORDER CITIES

A Catholic priest has called upon many businessmen in the Lower Rio Grande Valley to search their conscience, to ask themselves if they are not hurting their own communities by hiring alien commuters for work that should be done by U.S. citizens.

"Our big purpose should be to develop a moral consciousness among our businessmen to induce them to give the job opportunities to American citizens," said the Rev. Joseph O'Brien, assistant pastor of Our Lady of Guadalupe, the largest Catholic parish in Brownsville. " * * * Our first moral responsibility is to our people, who have a right to work, a right to a living wage when they work, a right to their own productivity and to the fruits of that productivity."

Father O'Brien spoke out at a meeting of the Cameron County Commissioners Court to discuss a U.S. Department of Agriculture surplus food program for Valley needy. He warned that the program adopted by the court for a 60-day trial period was only a "stop-gap." The solution lies in providing work for U.S. citizens in jobs now held by the aliens, he said.

Some have argued that the economy of communities on the Mexican side of the border would be seriously disrupted if

Mexicans were denied the right to work on the U.S. side. The argument reaches its logical conclusion with the contention that U.S. and Mexican cities along the border have developed into single economic communities under the commuter visa system. This surely, has been the effect. But who can justify dragging the standard of living of U.S. citizens down to the level of the Mexican standard? Does this really improve U.S.-Mexican relations?

The fact is that U.S. businesses which employ commuter aliens profit personally through the low wage scales they can enforce. But only at the expense of the community in which they live.

Perhaps businessmen affected will not "develop a moral consciousness" sufficiently strong to induce them to hire citizens rather than aliens. But the day of reckoning cannot be far off. In one way or another—probably by a court order—the practice will be halted, not because we harbor any ill feeling for the eager, industrious workers from Mexico, but because the basic welfare of our own citizens must come first.

JUDGMENT

(Entered April 11, 1963)

This cause having come before the Court on Government Defendants' motion to dismiss and alternative motion for summary judgment; on Intervenor Defendants' motion to dismiss; and on Plaintiffs' motion for summary judgment, and the Court having heard oral argument of counsel on January 15, 1963, and having considered the record and being fully advised in the premises,

It is this 11th day of April, 1963,

ORDERED:

(1) That Government Defendants' motion to dismiss and Intervenor Defendants' motion to dismiss be, and the same hereby are, granted;

(2) That Plaintiffs' motion for summary judgment be, and the same hereby is, denied; and

(3) That this action is dismissed with prejudice and without costs.

/s/ BURNITA SHELTON MATTHEWS
UNITED STATES DISTRICT JUDGE

NOTICE OF APPEAL

(Filed June 6, 1963)

Notice is hereby given that the ^{plaintiffs}~~defendants~~ whose names appear on the appendix attached hereto and made a part hereof as Appendix A, defendants in the above entitled and numbered cause, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on April 11, 1963, said judgment being the order of the District Court granting defendants' motion to dismiss, intervenor's motion to dismiss, and dismissing plaintiffs' action with prejudice.

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Dallas 1, Texas

By /s/ Charles J. Morris

Charles J. Morris

J. ALBERT WOLL
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By /s/ J. Albert Woll

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APPENDIX A

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Severo Adame, Armando Barragan, Ramona G. Bill, Hector F. Castro, Vicente Esquivel, Emeterio Favela, Jr., Jose S. Garza, Francisco Guanajuato, Guadalupe E. Guzman, Preciliano B. Ibarra, Jose G. Jimenez, Salvador Jimenez, Arturo Martinez, Juan R. Martinez, Manuel Nieto, Ramiro Olivares, Rogelio Patino, Jose Barrera Salas, Juanita C. Salas, Esperanza G. Sandoval, Margarito Sandoval, Felix San Miguel, Jr., Josefina G. San Miguel, Juan Hernandez Tristan, Enrique Villegas, all residing in Del Rio, Texas.

Pedro Aguero, Sr., Felix Alva, Velia Barragan, Gilberto Cantu, Rodolfo Cantu, Toribio G. Cantu, Martiniano Cardenas, Ernesto Chavez, Jesus Chavez, Ruperto Chavez, Manuel Cruz, Theodore R. Delapass, Andres Dimas, Leopoldo Dominguez, Dolores Elizondo, Francisco Fernandez, Nieves E. Gallardo, Arturo V. Garcia, Ramon Garcia, Martha Gonzalez, Rufino Granado, Rafael Guerra, Maria Jesus Hernandez, Ramon Hilario, Jose A. Juarez, Jr., Aida Leyva, Santiago R. Licon, Daniel Lombrano, Diana Lozano, Julia Maldonado, Rosa Maria Maldonado, Celestino Mata, Encarnacion Mata, Jose Mata, Jose Mendoza, Heriberto Molina, Benito Moreno, Carlos Moreno, Maria Azucena Moreno, Maria Guadalupe Moreno, Oscar Noriega, Reynaldo

C. Paez, Hector L. Pearson, Jose G. Quintanilla, Jose Angel Ramirez, Alfredo Andres Ramon, Jr., Pablo Renteria, Antonio D. Rodriguez, Jesus M. Rodriguez, Roberto Rodriguez, Tiburcio Rodriguez, Juan Rogerio, Oscar M. Rogerio, Ricardo Rogerio, Raul Sanchez, Juan Saenz, Aniceto M. Saucedo, Emilia M. Saucedo, Ernestina Schunior, Ildefonso Sernz, Jr., Leopoldo Serna, Blas Solis, Genero S. Solis, Carlota C. Tijerina, Lino Torres, Daniel M. Valdez, Alberto Vargas, Abraham Vasquez, Adelina Vasquez, Cruz Vasquez, all residing in Laredo, Texas.

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Ernesto Z. Alaniz, Raul Atkinson, Juan M. Balli, Juventino Barbosa, Ralph Delgado, Feliciano E. Elizondo, Oralia Elizondo, Francisco Fuentes, Jose C. Garcia, Manuel S. Garcia, Jessie Garnello, Telesforo Garza, Guillermo C. Hernandez, Tomas Hull, Manuel Moran, Mauricio Moran, Victor Manuel Moran, Jesus Moreno, Juan Pena, Rodolfo Revuelta, Manuel Rodriguez, Elijio Ruth, Alfonso A. Trevino, Eliseo S. Trevino, Jose R. S. Trevino, Jose Villegas, all residing in Brownsville, Texas.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C.

No. 17,976

TEXAS STATE, AFL-CIO, *et al.*, *Appellants,*

v.

ROBERT F. KENNEDY, Attorney General
of the United States, *et al.*, *Appellees.*

APPELLANTS' STATEMENT OF POINTS
(Filed July 22, 1963)

TO: Gil Zimmerman
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Washington 4, D. C.
Attorneys for the Intervenor Appellees
Clerk, United States Court of Appeals
District of Columbia Circuit
Washington, D. C.

Appellants submit the following statement of points on which they intend to rely on the appeal herein, pursuant to Rule 15:

1. The Immigration and Naturalization Act of 1952 prohibits extending immigrant status to non-resident "commuters."

2. Government defendants are required to utilize such statutory provisions as Title 8 U.S.C. §§ 1101(a) (15) (H), 1203, 1225, 1226, and 1361, rather than those statutory provisions for admitting aliens for permanent resident, for the purpose of allowing non-resident aliens to enter the United States for purposes of employment.

3. United States residents who are of a class displaced from jobs by "commuters" and whose earnings and living standards are depressed by "commuters" have standing to bring this action.

4. A labor organization representing some of the aforesaid resident class and having authority to represent union members in said class, has standing to bring this action.

5. The trial court erred in considering the ex parte affidavit of the Secretary of State.

6. The trial court erred in granting motions to dismiss.

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Attorneys for Appellants

BRIEF FOR APPELLANTS

In the
**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17,976

TEXAS STATE AFL-CIO, ANTONIO AGUILAR,
JULIA AMAYA, *et al*,

Appellants,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, and
RAYMOND F. FARRELL, COMMISSIONER OF
IMMIGRATION AND NATURALIZATION,

Government Appellees,

and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES (LEYVA),
CONCEPCION AURORA CAGIGAS FRAJO, *et al*,

Intervenor Appellees.

ON APPEAL FROM JUDGMENT OF DISTRICT COURT
OF DISTRICT OF COLUMBIA DISMISSING ACTION

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 19 1963

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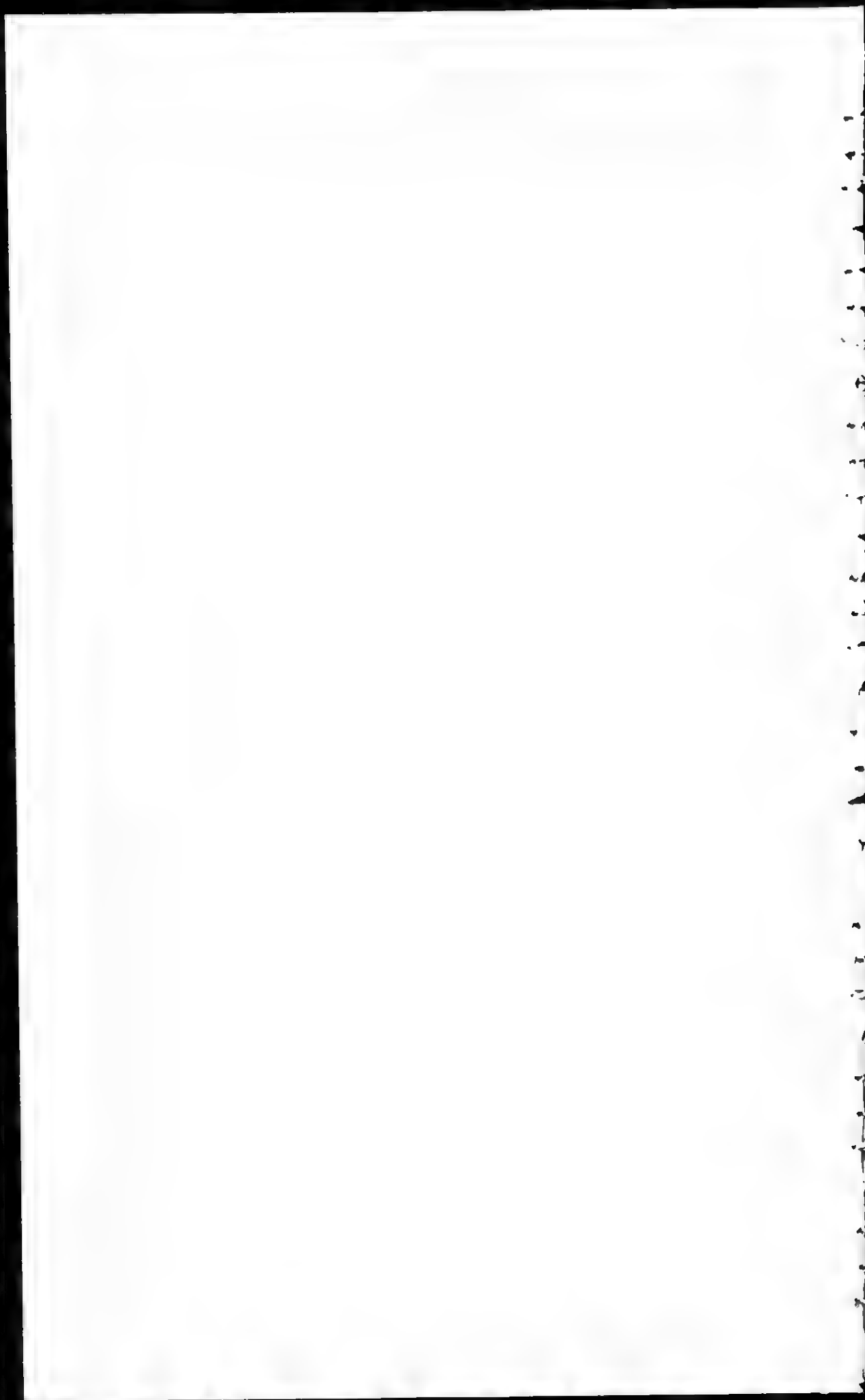
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QUESTIONS PRESENTED

i

1. Whether, under the Immigration and Nationality Act of 1952, the status of aliens "lawfully admitted for permanent residence" may be conferred upon and retained by Mexican nationals who fail to establish or maintain residence in the United States, who continue to reside in Mexico and who commute daily to employment in the United States;

2. Whether such commuting aliens may enter the United States for the purpose of performing services or labor, without regard to Sections 101(a)(15)(H)(ii) and 214 of said Act, which require, as a condition of entry and employment of aliens entering for such purpose, that "unemployed persons capable of performing such service of labor cannot be found in this country" and compliance with such other "conditions as the Attorney General may by regulations prescribe;"

3. Whether United States residents who have suffered unemployment and depressed wages as a result of the entry and employment of said commuting aliens have standing to bring this action as individuals and as representatives of a class; and

4. Whether a labor organization representing such United States residents and representing affiliated labor unions whose legitimate activities have been hampered by the entry and employment of said commuting aliens has standing to bring this action.

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BRIEF FOR APPELLANTS

In the
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Government Appellees,
and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES (LEYVA),
CONCEPCION AURORA CAGIGAS FRAIJO, *et al*,
Intervenor Appellees.

**ON APPEAL FROM JUDGMENT OF DISTRICT COURT
OF DISTRICT OF COLUMBIA DISMISSING ACTION**

JURISDICTIONAL STATEMENT

This case is before the Court on an appeal from the Judgment of the United States District Court for the District of Columbia dismissing plaintiffs' action with prejudice. [J.A.¹ 108] Appellants seek reversal of that Judgment and remand to the District Court for appropriate relief. The District Court had jurisdiction under Title 8 U.S.C. § 1329 [Section 279 of the Immigration and Nationality Act of 1952], Title

¹Joint Appendix, as abbreviated herein.

28 U.S.C. § 1331, and Title 5 U.S.C. § 1009 [Section 10 of the Administrative Procedure Act of 1946,] [J.A. 9]:² This Court has jurisdiction under Title 28 U.S.C. §§ 1291 and 1294.³

STATEMENT OF THE CASE

Inasmuch as this is an appeal from the dismissal of the action prior to trial on the merits, the issues presently before this Court depend primarily on the facts as stated in the Complaint. But the record also contains much independent evidence as to such facts. See especially deposition of Larry Parnass, designee of the Secretary of Labor, [J.A. 70-79] and admissions in the Answers of government and intervenor defendants (appellees) [J.A. 24, 37].⁴

The material facts, which describe a general practice, are not in dispute; therefore, the questions posed in this appeal are pure questions of law.

Both government and intervenor defendants filed responsive Answers, and after the suit had been pending a full year and was awaiting disposition of plaintiffs' motion for summary judgment both defendants filed motions to dismiss. The latter motions were considered together with motion and

²Raised in Complaint [J.A. 9], except that reference to Section 10 of Administrative Procedure Act was raised at p. 38 of *Plaintiffs' Reply Memorandum Supporting Motion for Summary Judgment and Opposing Motions to Dismiss*. [Not printed in Joint Appendix.] In addition to seeking relief in the nature of mandamus [Rule 81(b), Federal Rules of Civil Procedure], appellants also sought a declaratory judgment [Title 28 U.S.C. § 2201, Rule 57, Federal Rules of Civil Procedure], Prayer in Complaint [J.A. 22-23].

³These jurisdictional statutes with full citations are set out at pp. 15a, 19a, 20a, 21a, *infra*, in Appendix.

⁴Government appellees indicated additional reliance on an affidavit of the Secretary of State and on affidavits of individual commuters attached to the Answer of the intervenor appellees, but none of the competent facts asserted in those instruments controvert the material allegations of the Complaint regarding statement of a claim upon which relief may be granted or statements of fact which establish jurisdiction.

cross motion for summary judgment. The trial court⁵ denied plaintiffs' motion for summary judgment and granted the motions to dismiss. Judgment was entered without opinion. [J.A. 108]

Although appellees state their grounds for dismissal in various ways [J.A. 80-82], essentially they allege that

1. The Complaint fails to state a claim upon which relief can be granted, and
2. Appellants lack standing to bring this action.⁶

This is an action in the nature of mandamus and for a declaratory judgment in which the Texas State AFL-CIO, a labor organization, and 180 United States residents who live in the Texas communities of El Paso, Del Rio, Laredo, McAllen, and Brownsville, in a class action, seek to end the practice whereby the status of "aliens admitted for permanent residence" is used by residents of Mexico as a fiction to permit them to commute daily to employment in United States border communities across the Rio Grande River. Appellants seek an adjudication that such aliens admitted for permanent residence in the United States, in order to retain such status, be required to reside in the United States, and that aliens who enter this country for the sole purpose of working here, without intent to establish bona fide residence, be required to enter as nonimmigrants under express provisions of the 1952 Immigration

⁵The Honorable Bernita Shelton Matthews.

⁶Government appellees also allege that even if jurisdiction exists, the Court should not exercise it because "a decision adverse to the Government would have a serious deleterious effect upon the foreign relations of the United States." The trial court dismissed the action "with prejudice," apparently finding no jurisdiction or no justiciable claim. There is no reason to construe the trial court's action as a mere discretionary abstention from exercising the judicial function. [J.A. 81] But if it were merely such an abstention, rather than a finding of no jurisdiction, the errors which appellants assert herein are equally applicable.

and Nationality Act which set up protective conditions, provided by the Act and available to the Attorney General, whereby employment, wages, and working conditions of United States residents are safeguarded.⁷

The record discloses that an unknown number of such commuters—variously estimated from 30,000 to more than 50,000—commute daily from their homes across the border in Mexico to jobs in the United States. Because the Immigration and Naturalization Service treats these “commuters” as immigrants, it maintains no record of which or how many such “immigrants” reside in Mexico and commute to the United States. For this reason, no one can say for certain how many commuters there are, where they live, or how long they have been commuting.” Although some commuters may have resided at one time in the United States, it is undisputed that substantial numbers of them have never lived on this side of the border and each such person “has been commuting continuously to employment in the United States from the time that he first received his card [I-151 card indicating permanent resident alien status].”¹⁰

Government appellees have advised commuters “that it is not necessary to have actual residence in the United States

⁷§ 101(a)(15)(H)(ii), § 212(a)(14) and § 214 of the Immigration and Nationality Act of 1952, *hereinafter called the Act*.

⁸Complaint [J.A. 17]; Parnass deposition [J.A. 71, 78]; Dean Rusk Affidavit [J.A. 84].

⁹Government appellees have published statistics and observations from which it may reasonably be concluded that the commuter replaced the illegal wetback: Mexican immigration to the United States (which would include the commuters) rose from an average of 8,000 a year just after the Second World War to 18,000 in 1953 and to 65,000 in 1956. *Bulletin No. M-85* (1962), “Our Immigration,” Department of Justice, Immigration and Naturalization Service, p. 17.

“The large increase in Mexican immigration followed ‘operation Wetback’ in the Southwest in 1954, when Immigration Service Officers rounded up Mexicans who had entered the country illegally and sent them back to Mexico.” *Ibid.*

¹⁰Affidavits of intervenors, J.A. 43, 45, 50, 54, 55, 59 and 61.

to maintain the right to commute" [J.A. 51, 82], although Section 222(a) of the Act requires every alien applying for an immigrant visa to state "whether or not he intends to remain in the United States permanently," and the alien commuters have an established practice of furnishing addresses in the United States (for example, addresses in Laredo, Texas) "to employers and governmental officials and posing as residents of this country * * *." [J.A. 71-72] Furthermore, government appellees "admit that they have *knowingly* permitted the entry of alien commuters having the status of aliens lawfully admitted for permanent residence under the Immigration and Nationality Act of 1952 * * *." (Emphasis added.) [Answer of Government Defendants; J.A. 28].¹¹

The Complaint alleges that government appllees have "largely ignored" the provisions of §§ 101(a)(15)(H) and 214 of the Act as a source of alien labor which can be made available without displacing workers in the United States. The Annual Reports of the Immigration and Naturalization Service, of which judicial notice may be taken,¹² support this conclusion: since 1952, an average of only 603 industrial trainees and temporary workers from Mexico have entered

¹¹The District Director of the Immigration and Naturalization Service, El Paso, Texas, also stated (as quoted in the Department of Labor Report) that

"A very substantial number of aliens, giving El Paso addresses and who purport to live in El Paso, but may not do so, had been admitted under the Statute in question to work in El Paso." [JA. 78]

¹²The trial court was formally requested to take judicial notice of the *Annual Reports of the Immigration and Naturalization Service* (Department of Justice) and the *1962 County and City Data Book* (Department of Commerce, Bureau of the Census). See *Appendix to Plaintiffs' Reply Memorandum Supporting Motion for Summary Judgment and Opposing Motions to Dismiss* [not printed in Joint Appendix]. These and the Department of Labor Reports attached to the Parnass deposition are official reports made by governmental agencies in the regular course of business pursuant to statutory authority and are therefore admissible. *National Labor Relations Board v. Atkins*, 331 U.S. 398, 406, 91 L.Ed. 1563, 67 S.Ct. 1265; *U. S. v. Biggs Const. Co.*, 116 F.2d 768 (C.A. 7); *Williamson v. Union Oil Co. of Calif.*, 125 F. Supp. 570, 572 (D. Colo.); 32 C.J.S. 477-478.

each year under these sections.¹³ This figure may be compared with the large number of entries during the same period under Title 7 U.S.C. 1461-1468 [Agricultural Act of 1949, Title V], the "Bracero" statute, where the restrictions on admissions¹⁴ are more stringent than those under § 101(a)(15)(H): from 1953 to 1962 a total of 3,467,985 agricultural laborers from Mexico were admitted—an average of 346,798 each year.¹⁵

As a result of the extensive use of commuter labor, with the consequent nonuse of the "safeguarded" statutory provisions for entry of nonimmigrant aliens for employment purposes, resident workers, including the 180 individual appellants and the class they represent, have suffered unemployment and depressed wages and working conditions. [Complaint, J.A. 18-20]

A Department of Labor Report, on file herein, observed that in Laredo, Texas,

"In the menial jobs, particularly in the hotel and restaurant industries, the alien commuters are employed extensively at wage rates, in some instance, so low as to be symbolic of *peonage*." [J.A. 72, emphasis added.]

¹³ *Annual Reports of the Immigration and Naturalization Service*, Department of Justice, 1952-1962, Table 16 of each report.

¹⁴ "Sec. 503. No workers recruited under this title shall be available for employment in any area unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such workers are to be employed, (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts have been made to attract domestic workers for such employment at wages, standard hours of work, and working conditions comparable to those offered to foreign workers. * * * [7 U.S.C. § 1463, Oct. 31, 1949, c. 792, as amended, 65 Stat. 120, 69 Stat. 615, 75 Stat. 761]"

¹⁵ *Annual Report of Immigration and Naturalization Service*, Department of Justice, 1962, Table 18.

The same report [Pl. Ex. 1] concluded "that employers in this area prefer the alien commuter because he will work for less wages than will the domestic." [J.A. 72]

Typical of the Report's comments was the following:

"* * * Since the domestic worker's ability to bargain for better rates is of necessity affected by the commuter's willingness to work for lower rates, it seems to us that this is definite evidence of adverse effect here." [J.A. 73.]

Sample wages shown by the Report on Laredo included wages of \$60.00 per month for hotel maids, \$40.00 per month and meals for bus boys, \$25.00 per week for cashiers in drug and related establishments, and \$17.00 per week for grocery checkers. [J.A. 74]

A Department of Labor Report on El Paso [Pl. Ex. 2] found that the commuter alien worker is employed in "substantially all types of industries in the El Paso employment area" [J.A. 75], and "that a substantial number of [unemployed] domestics are available for jobs filled by the Mexican alien commuter workers in the occupations and industries included in these investigations." [J. A. 75] The same Report concluded

"* * * that the willingness of the commuter alien to work for possibly substandard wages necessarily impairs the domestic power to bargain for better rates." [J.A. 77.]

Unemployment rates in the border counties of Texas are among the highest in the United States. The trial court was asked to take judicial notice¹⁶ of the following data in the

¹⁶*Plaintiffs' Reply Memorandum Supporting Motion for Summary Judgment and Opposing Motions to Dismiss*, Appendix: Economic Data [Not printed in Joint Appendix].

1962 *County and City Data Book*, U. S. Department of Commerce, Bureau of the Census (identified by page, table and item) :

In 1960, the rate of unemployment for the United States as a whole was 5.1% (p. 4, Table 1, Item 35). At the same time, the rate for the State of Texas as a whole was much more favorable: 4.5% (p. 4, Table 1, Item 35).¹⁷ The most populous Texas counties along the Mexican border, which are also the counties suffering from the unregulated influx of alien commuters, showed the following rates of unemployment for the same period:

Cameron County (Brownsville) 8.4% (p. 354, Table 2, Item 35)

El Paso County 6.5% (p. 354, Table 2, Item 35)

Hidalgo County (McAllen) 6.3% (p. 364, Table 2, Item 35)

Maverick County (Eagle Pass) 15.1% (p. 364, Table 2, Item 35)

Val Verde County (Del Rio) 6.7% (p. 374, Table 2, Item 35)

Webb County (Laredo) 10.4% (p. 374, Table 2, Item 35)¹⁸

The Complaint alleges that the entry of commuters has caused union members to suffer unemployment and low wages, and that commuters because of their precarious status as "immigrants" residing in a foreign country have remained non-union and are a source of "strike breakers,"¹⁹ thereby

¹⁷The Texas unemployment rate included the high rate of unemployment found in the counties along the Mexican border.

¹⁸"[A]s of June 1, 1961, a total of 2,662 persons in the Laredo labor market were unemployed for a high percentage rate of 11.32 * * *," while at the same time there were 3,000 alien commuters working in Laredo, according to a "conservative" Labor Department estimate. [J.A. 71]

¹⁹*Cf. Amalgamated Meat Cutters v. Rogers*, 186 F. Supp. 114 (D.D.C.).

preventing or discouraging legitimate strike activity which, if available, could improve wages and working conditions in the affected areas [J.A. 20-21]. These allegations are undisputed for purposes of appellants' standing to sue, and they are not denied by government appellees [J.A. 28, ¶¶ 20 and 21]. Appellees presented no proof to the contrary in support of their motions to dismiss, thereby relying on appellants' allegations in the complaint.

SUMMARY OF ARGUMENT

I.

A. The pertinent provisions of the statute, the Immigration and Nationality Act of 1952, exclude entry of commuters. The Act contains no provisions to grant permanent resident alien status to aliens who continue to reside in a foreign country, and who desire to enter the United States solely for daily employment as international commuters. The 1952 Act tightened the requirement for permanent resident status by precisely defining the terms *permanent* and *residence*.

The only court which has written on this subject was the District Court for the District of Columbia in *Amalgamated Meat Cutters v. Rogers*, 186 F. Supp. 114 (D.D.C.), in which Judge Youngdahl found that it "is not possible for them [the commuters] to be aliens lawfully admitted for permanent residence." (at pp. 118-119)

The Act provides other exclusive means for the entry of alien labor as nonimmigrants rather than as immigrants. These provisions apply to an alien who has "a residence in a foreign country which he has no intention of abandoning." § 101(a)(15) (D), (E), (H), and (I). § 101(a)(15) (H)

(ii) is especially in point, for it allows unlimited entry of alien labor of all types with the single limitation—an important safeguard—that unemployed residents of the United States must not be available to do the work. Additional safeguards are found in § 214(c) and 212(a)(14), under which other public officials, in addition to the Attorney General who is charged with administration of the Act, particularly the Secretary of Labor, participate in the procedures under which alien workers may enter so long as they do not adversely affect the wages and working conditions of domestic workers. To date these statutory safeguards have been ignored, for the unregulated commuter traffic has supplied abundant cheap labor to the communities on this side of the Rio Grande.

The definition of "lawfully admitted for permanent residence" requires *continuing residence* as a condition, based on the proviso in the clause: "such status not having changed."

The same conclusion is derived from § 101(a)(20) which provides a means to supply missing records of said status, where proof of *continuous* residence is spelled out as a condition.

The administrative practice has also been to require residence as a condition of the status, save for commuters where *employment* has been administratively substituted for *residence*.

The 1952 Act covers all categories of aliens who are allowed to enter the United States. There is no hiatus in the statute to allow for a non-statutory category of international commuters. § 101(a)(27)(B), § 101(a)(32).

B. The commuter practice may have been legal prior to passage of the 1952 Act, when there was an express administrative regulation covering commuters—originally General Order 86—which treated them as immigrants. This practice, however, was based on different statutory requirements whereby it was not necessary for one to be a resident in order to be an immigrant. *Karnuth v. U. S. ex. rel. Albro*, 279 U. S. 231. When the Administrative Procedure Act of 1946 was passed, the Immigration and Naturalization Service reissued the regulation as 8 C.F.R. § 110.6. But when the 1952 Act was passed, repealing the regulations under the old statute, 8 C.F.R. § 110.6 was not reissued, and to this day there is no regulation in existence governing the commuter practice.

There was no basis for reissuance of a commuter regulation, for the new statute drastically changed the wording of 8 U.S.C. § 204(b) which had been authority for the commuter practice. The corresponding provision in the 1952 Act added the requirement of *permanent residence* as a condition to entry of a nonquota immigrant returning from a temporary visit abroad. [§ 101(a)(27)(B)]

It was not until almost two years after passage of the Act that the Board of Immigration Appeals, in the *Matter of H O*, 5 I. & N. Dec. 716, determined that the commuter practice had not been disturbed by the Immigration and Nationality Act of 1952. Thus, during those first two years the absence of both regulation and decided cases indicated a contrary administrative view.

C. Appellants' position is fully supported by the plain language of the statute, therefore, reference to legislative history should make no difference. However, legislative

history also supports the view that Congress established *residence* as an absolute requirement of permanent resident alien status—thereby outlawing the commuter practice—and provided a new and exclusive means for entry of alien labor on a nonimmigrant basis and with safeguards designed to protect domestic labor.

The most authoritative report bearing on legislative history was the House Report. It indicated an intent to eliminate gaps and loopholes, and to “circumscribe” the use of border crossing cards with “definite statutory limitations.” The Report noted that the bill “modifies existing law” in defining immigrant status, and residence was made a *sine qua non*.

The Board of Immigration Appeals conceded in *Matter of M D S & L G & U D C*, 8 I. & N. Dec. 209 (1958), that the commuter does not fit into any category in the statute and that the status is an artificial one. There is no legal basis for such a non-statutory status, and the Attorney General has no authority to create one.

The definition of resident alien and the provisions for entry of a nonimmigrant worker “having a residence in a foreign country which he has no intention of abandoning” [§ 101(a)(15)(H)] should be read in *pari materia*. The congressional intent to safeguard American labor standards, especially in those individual localities not capable of absorbing the aliens seeking entry, is effectively frustrated by the commuter practice, which knows no regulation and no safeguard for domestic labor.

II.

Appellants have standing to bring this action, relying on *Amalgamated Meat Cutters v. Rogers*, *supra*, and other authority which recognizes the right of a labor union or comparable organization to sue to enforce a right which affects it or its members. Individual appellants have suffered special damages, including low wages and unemployment, because of the presence of commuters, and no other remedy is available. Mandamus is therefore appropriate. The Administrative Procedure Act, 5 U.S.C. § 1009(a), (c), and (e), also confers the right of review, citing *Estrada v. Ahrens*, 296 F. 2d 690, and *Stark v. Wickard*, 321 U.S. 288.

Appellants complain of both action and inaction by the Attorney General. His failure to use § 101(a)(15)(H)(ii) and § 214, which were amended at the behest of organized labor, is certainly subject to the judicial complaint of organized labor seeking to enforce these provisions.

ARGUMENT

I. The Immigration and Nationality Act of 1952 does not permit entry of "commuters".**A. Statutory Construction**

In 1952 the Congress completely revised and re-codified the immigration and naturalization statutes. The resulting new Act contained no provisions to grant permanent resident alien status to aliens who reside in foreign contiguous territory and who desire to enter the United States solely for daily employment as international commuters. On the contrary, Congress tightened statutory requirement for admission for "permanent residence," and precisely defined the terms *permanent* and *residence* so as to exclude the commuter from

qualifying for immigrant status. At the same time, recognizing the need for entry of alien labor under certain circumstances, Congress wrote detailed but flexible provisions for entry of alien labor as nonimmigrants under limitations designed to safeguard wages and working conditions of workers residing in the United States. These provisions for entry of nonimmigrant labor would allow aliens residing in foreign contiguous territory to commute, but not as unregulated immigrants entering under an "amiable fiction",²⁰ but as nonimmigrants entering under conditions established by the Attorney General and the Secretary of Labor to protect domestic employment.

It is thus obvious that appellants do not seek to close the border. We are proud of the open border with our neighbors to the north and to the south. We do seek, however, judicial enforcement of the Congressional mandate of 1952: (1) that persons who have been accorded the status of permanent resident aliens be required to reside in the United States or lose that status, and, (2) that those aliens having a residence in a foreign country which they have no intention of abandoning, who desire to work in the United States, do so only as nonimmigrants under the statutory conditions expressly provided for entry of such alien labor.

Only one court has previously written on the subject in issue. On July 7, 1960, Judge Youngdahl, writing for the District Court for the District of Columbia in *Amalgamated Meatcutters v. Rogers*²¹ declared the law applicable to "com-

²⁰A term used by Judge Luther Youngdahl in *Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO v. Rogers*, 186 F.Supp. 114, 119, quoting Gordon & Rosenfield, "Immigration Law and Procedure," (1959), p. 127.

²¹*Id.*

muting aliens". The defendants in that case held the same statutory offices as the government appellees herein, and in effect they are the same parties. It is significant that the decision in *Amalgamated Meatcutters v. Rogers* was allowed to become final, for the government defendants did not appeal.

Although the court in that case was faced with the immediate question of whether § 212(a)(14) of the Act was applicable to commuting aliens, in order to answer this question it first had to determine the legal status of these commuters. Judge Youngdahl therefore asked (186 F. Supp. 118):

"Are commuters aliens lawfully admitted for permanent residence? If not, can they be so treated administratively for the limited purpose of permitting their employment in the United States?"

The court answered with reference to the applicable statutory definitions as follows:

"The term 'lawfully admitted for permanent residence' is defined by § 101(a)(20) of the Act, 8 U.S.C.A. § 1101(a)(20) as:

'the status of having been lawfully accorded the privilege of *residing* permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.' (Emphasis supplied.)

"The term 'residence' is defined by § 101(a)(33) of the Act, 8 U.S.C.A. § 1101(a)(33) as:

'the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.
* * *'

The court therefore concluded and held as follows:

"With these legislative statements as a guide, it is clear that Mexican commuters do not reside in the United States, and *it therefore is not possible for them to be aliens lawfully admitted for permanent residence*. This should not mean, however, that Mexicans or Canadians cannot commute to work in the United States. *The defendants can utilize the documentary requirements and administrative procedures they think best under the applicable law for aliens who work in this country and live in Mexico or Canada*. If the defendants are satisfied that an alien can enter the United States to work here, they could then permit the alien to commute." (186 F. Supp. 118-119, emphasis added.)

The court's conclusion is further supported by the Act's definition of *permanent*: "A relationship of continuing or lasting nature, as distinguished from temporary * * *" § 101 (a) (31). Also, the definition of residence in § 101 (a) (33) contained a provision which allows a residential exception as to certain dual nationals and naturalized citizens (§ 350 and § 352), but the Act provides no exception to the requirement of actual, bona fide residence in the United States for persons who have been granted permanent resident alien status.

The 1952 Act did provide for the alien who has "a residence in a foreign country which he has no intention of abandoning," but who desires to work in the United States. Certain categories of such workers may be admitted. See especially § 101 (a) (15) (D) regarding entry of alien crewmen serving on board a vessel or aircraft; § 101 (a) (15) (E) regarding entry for trade or operation of enterprises in which the alien has invested; § 101 (a) (15) (H) regarding (i) entry of workers of "distinguished merit and ability," (ii) entry of temporary workers of any type when "unem-

ployed persons capable of performing such service or labor cannot be found in this country," and (iii) entry of industrial trainees; § 101(a)(15)(I) regarding entry of representatives of press, radio, film or other foreign information media."²²

Although § 101(a)(15)(H)(ii) placed only one limitation on entry of temporary workers, that unemployed domestics are not available to do the work, § 212(a)(14) added another safeguard which was discretionary with the Secretary of Labor. Obviously, mere unavailability of resident workers was not deemed sufficient protection for domestic labor, because alien workers who would compete for jobs by accepting substandard wages or working as strikebreakers during a strike²³ also "adversely affect the wages and working conditions of the workers in the United States similarly employed." Therefore, § 212(a)(14) provided a flexible administrative means to regulate the entry of alien workers so as to protect domestic wages and working conditions.

As if these comprehensive safeguards were not enough, Congress also added § 214(c) which was designed to provide the Attorney General with consultation of other administrative agencies, such as the Department of Labor and the United States Employment Service, in determining the entry of nonimmigrant labor under § 101(a)(15)(H).

The irony of this elaborate statutory scheme is that to date it has been wholly ignored. The safeguards which were the subject of lengthy testimony before Congressional com-

²²There were no comparable provisions in the statute prior to 1952, 8 U.S.C. (1946 Ed.) § 203.

²³The situation in *Amalgamated Meat Cutters v. Rogers*.

mittees prior to passage of the 1952 Act²⁴ have proved fruitless. § 101(a)(15)(H)(ii), § 214(c) and § 212(a)(14) are rarely used. They are not used because employers desiring to pay low wages—in fact barely subsistence wages in many instances—have no need to avail themselves of the Act's safeguards for resident labor. By taking advantage of the "amiable fiction" the employer is not faced with any such restrictions on wages or working conditions, and the commuter who lives in a foreign country under a different standard of living, where lower prices and wages prevail, is able to underbid the resident worker in the cruel competition for jobs in the depressed areas on the Texas side of the Mexican border.

The chief issue in this case involves construction of a statute, but it is not necessary to resort either to external aids or to legislative history—although such devices lead to the same conclusion—in order to ferret out the meaning of the Act.

§ 101(a)(20) defines the term "lawfully admitted for permanent residence" as the *status* of having been accorded the "privilege of residing permanently in the United States." What could be more clear in its requirement that the entry must be for the purpose of *permanent residence* rather than merely for employment? Furthermore, Congress guaranteed that permanent residence be a condition of maintaining that status, for the provision adds the further limitation: "*such status not having changed.*" (Emphasis added)

²⁴Joint Hearings before the Sub-Committee of the Committee on the Judiciary, Congress of the United States, 82nd Cong., First Session on S. 716, H.R. 2379, and H.R. 2816, March 6 through April 9, 1951, pp. 117-122, 662-667, 712-713, *inter alia*.

Another section of the 1952 Act alone proves that § 101 (a) (20) requires actual residence in the United States: § 249, which is the provision under which an otherwise missing "record of lawful admission for permanent residence," may be supplied. It requires that the alien "establishes that he— * * * has had his residence in the United States *continuously* since such entry * * *" (Emphasis added). Congress thus reaffirmed that lawful admission for permanent residence requires bona fide residence in the United States, i.e., application of the definition of *residence* contained in § 101 (a) (33), "the place of general abode * * * his principal, actual dwelling place in fact. * * *" In other words, an immigrant admitted for permanent residence—perhaps a commuter—whose record has been lost is required to prove continuous residence, not continuous employment, in order to establish his status. Obviously, no commuter could meet these requirements.

There is still more evidence to show what was meant by the phrase "such status not having changed." At 8 C.F.R. (1952) § 4.2, the administrators of the 1952 Act promulgated a rule concerning presumption of lawful admission, and based it on non-abandonment of status as a lawful permanent resident.²³ The concept of change in permanent resident alien status thus had a well-defined meaning when the Act

²³8 C.F.R. (1952) § 4.2

"Presumption of lawful admission. An alien of any of the following described classes shall be presumed to have been lawfully admitted for permanent residence within the meaning of the Immigration and Nationality Act (even though no record of his admission can be found, except as otherwise provided in this part) *unless the alien abandoned his status as a lawful permanent resident*, or lost such status by operation of law, at any time subsequent to such admission:

"(a) Aliens who entered prior to June 30, 1906. * * *

"(b) Aliens who entered across land borders of the United States * * *." (Emphasis added.)

The substance of this regulation was re-written in 1958, without changing the material part, and now appears at 8 C.F.R. (1962 Pocket Supp.) § 101.1.

was passed. A leading Board of Immigration Appeals case on the subject was *Matter of D C*, 3 I. & N. Dec. 519, in which the Board refused readmittance to an alien previously granted permanent resident alien status because he had not taken up residence. It cited the unreported case of *Matter of F*, A-6783639 and A-6789803, July 1, 1948 (C.O.):

"in which it was decided that an alien previously admitted for permanent residence will not be readmitted on the basis of an unexpired resident alien's border crossing identification card if it appears that at the time he obtained the card he intended to return to his home and employment in Canada. In that case the aliens involved, a husband and his dependent wife, *had never taken up actual residence in the United States* and, at the time they obtained their crossing cards, their intention was to return to their home and the husband's employment in Canada, with the thought of eventually entering the United States to reside. When they sought readmission to the United States upon presenting their border crossing cards, with the intention of entering the United States to see if they liked it and, if not, to take a trip to California, their exclusion ensued and was affirmed, on appeal." (Emphasis added.)

In both the *D C* and *F* cases, it was firmly established that the mere possession of the privilege of residing in the United States did not continue the status, and the alien lost the privilege of residing in the United States.

Without the benefit of statute or regulation, government appellees have devised a special rule for commuters which also recognizes that the status must not change. The concept of status, however, has been amended by administrative fiat from *residence* to *employment*. The commuter must maintain his commuter status by maintaining his *employment*, and if he fails to do so he loses the status of having been lawfully accorded the privilege of residing permanently in

the United States. This may read like double talk, but this "amiable fiction" is actually followed. A six-month rule, whereby a commuter is deemed to have "abandoned his status" if he is unemployed for a six-month period, has been devised, in disregard of the rule making provisions of the Administrative Procedure Act, with exceptions being recognized only for such special circumstances as pregnancy or illness. See, for example, *Matter of M D S and L G and W D C*, *Interim decis.* 967 Dec. 12, 1958, where it was held that

"* * * the commuter who has been out of employment in the United States for 6 months is, notwithstanding temporary entries in the meanwhile for other than employment purposes, *deemed to have abandoned his status of a permanent resident in the United States* and thereafter, if he seeks to reenter, is not admissible without again qualifying for admission as a permanent resident.

* * * * *

"Thus, it would appear that a commuter is entitled to readmission as a returning resident, but that *the primary consideration is that he maintain the status of a commuter.*" (Emphasis added.)

See also *Matter of L*, *Interim decis.* 1076, May 11, 1960.

There is of course absolutely no statutory or regulatory authority for such a holding by the Attorney General (through the Board of Immigration Appeals), and it is obviously inconsistent with the recognized rule of *Transatlantica Italiana v. Elting* (C.A. 2, 1933), 66 F. 2d 542, that a resident alien must maintain his residence in the United States, and if he fails to do so, then, on attempted reentry, he will be excluded. Justice Learned Hand's opinion in the *Elting* case:

"It is not clear as an original question that the phrase, 'returning from a temporary absence abroad,'

implies that the alien must have acquired a domicile here, not relinquished during his absence. It is certainly possible to read the language as meaning no more than that the alien had resided here, meant to come back when he left, and did not change his mind while absent. However the departmental interpretation of the clause under the Quota Act of 1921, §2(a), did construe it as implying domicile, and the Act of 1924 repeated the language. This was at least a reasonable interpretation of the language which we are not prepared to disavow. *We hold therefore that the returning alien must have been domiciled and retained his domicile * * ** (Emphasis added.) 66 F. 2d 542, 545.

The 1952 Act codified this rule by its definitions in § 101(a)(20), § 101(a)(27)(B), § 101(a)(31) and § 101(a)(33).²⁶

By express language, the 1952 Act covers all categories of aliens who are allowed to enter the United States. There is no hiatus which would permit daily entry of a non-statutory group such as non-resident commuting immigrants. The pertinent clause relating to returning nonquota immigrants is § 101(a)(27)(B), recognizing entry of

“an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad.”

The commuter cannot legally meet this definition, for when he crosses into the United States he is not returning from a temporary visit abroad, rather, he is leaving his permanent home in Mexico for a temporary visit to work in the United States, then only to cross back into Mexico after his “temporary visit abroad.” *Abroad* to him, however, means the United States. No amount of twisting of the statutory

²⁶These amendments also avoided the potential conflict which the *Elting* and *Albro* decisions posed. See discussion of *Karnuth v. U. S.*, *ex rel. Albro*, 279 U. S. 231, 49 S. Ct. 274, 73 L. Ed. 677, *infra*, pp. 24-25.

language can make it into legal authority for the practice complained of herein.

To be sure that no loophole or hiatus existed in the statutory scheme, Congress closed all gaps with the following exclusionary language in § 101(a)(32):

"An alien who is not particularly specified in this chapter as a nonquota immigrant or a nonimmigrant shall not be admitted *or considered in any manner* to be either a nonquota immigrant or a nonimmigrant notwithstanding his relationship to any individual who is so specified or by reason of being excepted from the operation of any law regulating or forbidding immigration." (Emphasis added.)

The italicized phrase *or considered in any manner* was inserted in the 1952 Act, the remainder of the clause being derived from the 1924 Act (8 U.S.C. § 205, Repealed). The commuters, such as intervenor appellees herein, are not "particularly specified" in the Act, therefore Congress clearly excluded them from the class of nonquota immigrants.

B. *Repeal of "Commuter Regulations" and Contemporary Construction of the Act After Passage*

The commuter practice may or may not have been legal under the 1924 Act, for the issue was never judicially determined. In any event, the question was rendered moot by passage of the 1952 Act, which is the sole basis for this action. It may be conceded, *arguendo*, that the practice was legal prior to 1952. But it was a practice that was openly recognized, with a colorable basis in law and with a published administrative regulation available for all to see.

Under § 4(b) of the 1924 Act (43 Stat. 155, former 8 U.S.C. § 204) a "non-quota immigrant" was defined to include

"An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad."

There was nothing in the 1924 statute which required immigrants to be residents of the United States; it was sufficient if they were *previously* lawfully admitted.²⁷

Under the 1924 Act, the Immigration and Naturalization Service therefore classified the commuter as an immigrant. It issued General Order 86 on April 1, 1927, which prescribed that aliens entering the United States to work were not to be deemed nonimmigrants visiting temporarily for business, but rather were to be regarded as immigrants. In 1929 the Supreme Court in *Karnuth v. U. S., ex. rel. Albro*, 279 U. S. 231, 242-243, 49 S. Ct. 274, 73 L. Ed. 677, construed a related provision,²⁸ the former 8 U.S.C. § 203, as follows:

"In construing section 3(a) of the Immigration Act, we are not concerned with the ordinary definition of the word 'immigrant' as one who comes for permanent residence. The Act makes its own definition, which is that 'the term "immigrant" means any alien departing from any place outside the United States destined for the United States.' The term thus includes every alien coming to this country *either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions.*" (Emphasis added.)²⁹

²⁷§ 203 of the 1924 Act (43 Stat. 154) defined an immigrant as "any alien departing from any place outside the United States destined for the United States except * * *" certain specified categories of non-immigrant aliens, which did not include an alien having a residence in a foreign country which he has no intention of abandoning who is coming to the United States to perform service or labor—a category included in the 1952 exceptions [§ 101(a)(15)(H)]. The 1952 Act, by contrast, abandoned language based on destination in the United States, and substituted precise categories of immigrants and nonimmigrants.

²⁸See footnote 27.

²⁹See footnote 26.

After the *Albro* decision the substance of General Order 86 was incorporated into the immigration regulations, and published as Rule 3, Subd. C, Par. 1, Immigration Rules of January 1, 1930 (G.P.O. 1935), as follows:

"Aliens entering the United States to engage in existing employment or to seek employment in this country and who desire to continue to reside in foreign contiguous territory will be considered as aliens of the immigrant class."³⁰

In 1946, while the 1924 immigration statute was still in effect, Congress passed the Administrative Procedure Act, 5 U.S.C. § 1001 et seq. (Public Law 404-79th Cong., Ch. 324 2d Sess.) We have more than a by-stander's interest in examining the reaction of the Immigration and Naturalization Service to passage of the Administrative Procedures Act, for what the Service did to conform its commuter practice to that Act points up what it chose not to do after passage of the McCarran-Walter Act in 1952.

The Administrative Procedure Act provided in 5 U.S.C. § 1003 for notice of proposed rules published in the Federal Register and an opportunity for interested persons—

"to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose."

³⁰This provision was carried forward in 8 C.F.R. 3.6 (1st ed., 1938), and thereafter reissued in 8 C.F.R. § 110.6 (1947 Supp.) and in 8 C.F.R. § 110.6 (1949 ed.). The statutory basis indicated after the regulation was "Sec. 3, 43 Stat. 154, 47 Stat. 607; 8 U.S.C. 203.

In compliance therewith, the I. & N. Service recodified its rules and regulations, 12 F.R. 5056.³¹ General Order 86 was reissued as § 110.6 (8 C.F.R. 1947 Supp. § 110.6).

8 C.F.R. § 110.6 continued as an active regulation until it was repealed when the 1952 Immigration and Nationality Act was passed.

The new Act, however, drastically changed the wording of the former 8 U.S.C. § 204(b) which, with the absence of a residence requirement in former § 203, had been used as statutory authority for the commuter practice.

8 U.S.C. § 204(b) of the 1924 Act defined "non-quota immigrant" to include

"An immigrant *previously* lawfully admitted to the United States, who is returning from a temporary visit abroad * * *" (Emphasis added.)

The corresponding provision of the 1952 Act reads as follows:

"§ 101(a)

"(27) The term 'nonquota immigrant' means—

* * * * *

"(B) an immigrant lawfully admitted *for permanent residence* who is returning from a temporary visit abroad * * *" (Emphasis added.)

A comparison of the amended provision with the repealed provision shows clearly that Congress insisted that the classification allowing return from temporary visits abroad be confined to bona fide resident aliens who actually reside in the United States and who are actually returning to their residences in the United States. The omission of the word *previously* is consistent with the new definition of "lawfully

³¹The recodification appears in the 1947 Supplement of the Code of Federal Regulations.

admitted for permanent residence," which includes a continuing requirement that *such status has not changed*, § 101 (a) (20). In other words, under the old Act, assuming the immigrant was "previously" admitted according to law, he could go back and forth without regard to place of residence. But the new law requires that the permanent residence status remain current, thus even if an alien were *previously* admitted lawfully, if he abandons his residence in the United States and resumes residence in Mexico he loses his status as a permanent resident alien because his "status" has now changed.

The first administrators of the 1952 Act evidently made the same analysis, for they did not reissue regulation 8 C.F.R. § 110.6, which was repealed with the passage of the 1952 Act.³² At no time in this action has appellees offered any explanation to account for this failure to reissue the substance of General Order 86 when new regulations were promulgated in 1952 to conform to the new Act.

The commuter practice should have thus ended quietly after the effective date of the 1952 Act, for there were probably relatively few commuters before 1952. One can only speculate why the administrators of the Act changed their view. Perhaps the increase in "legal" commuters in 1953, which coincided with the deportation of large numbers of illegal commuters in "operation wetback"³³ was a factor. In any event, the commuting continued, but without benefit of any rule, regulation, or notice to interested persons,

³²To this very day, there is not a single regulation published in the Federal Register or appearing in the C.F.R. compilation which even recognizes the existence of a class of immigrants known as "commuters."

³³See footnote 9, *supra*.

contrary to the express provisions of §§3 and 4 of the Administrative Procedure Act.

Contemporaneous construction of an ambiguous statute,³⁴ i.e., "the construction which executive department or officers charged with the enforcement of a statute give it at or near the time of its enactment," [82 C.J.S. 768] may be considered and given weight in construing the statute.

At or near the time of the enactment of the statute the administrators of the I. & N. Service did not consider commuters to be aliens of the immigrant class. It was not until March 16, 1954, almost two years after enactment by Congress (June 27, 1952), that the Attorney General, acting through the Board of Immigration Appeals, decided in the *Matter of H O*, 5 I. & N. Dec. 716, that

"The practice of considering commuters as permanent residents has not been disturbed by the Immigration and Nationality Act of 1952 * * *" (Headnote.)

In order to reach that erroneous decision, the Board had to reverse two preliminary administrative decisions which would have excluded H O on grounds that he was not an immigrant and therefore excludable under Section 212(a) (20) of the Act.³⁵

The immigration officer at the border made the first decision to exclude H O by detaining him under the authority of § 235 of the Act [8 U.S.C. 1225]. H O then had a hearing before a "special inquiry officer" pursuant to § 236 [8 U.S.C. 1226]. The special inquiry officer rendered his decision on October 14, 1953, almost sixteen

³⁴Although this statute is not ambiguous.

³⁵The Board cited 8 C.F.R. § 110.6 without noting its repeal and without explaining the absence of any current regulation containing the substance of General Order 86.

months after passage of the Act, ruling that H. O. was not an immigrant and therefore excludable.

Appellants submit that the decision of the special inquiry officer in the H. O. case was correct, and when the Board of Immigration Appeals reversed that decision the Attorney General was committing a legislative act which violated both the Immigration and Nationality Act of 1952 and the Administrative Procedure Act of 1946.

C. Legislative History

The plain language of the statute should make reference to legislative history superfluous in this case. This is not to say that legislative history does not support appellants' position. Quite the contrary, for it clearly indicates congressional intent to tighten the requirements for permanent resident alien status, making "residence" a condition of such status thereby outlawing the commuter program, and also an intent to provide means for entry of nonimmigrant labor under regulated conditions as the exclusive source for alien labor under the Act.

Nevertheless, "[t]he statute itself furnishes the best means for its own exposition * * *," 82 C.J.S. 736, and the statute herein, as we have noted, has a plain meaning. The Supreme Court has given "consistent adherence" to the canon of construction that "there is no need to refer to the legislative history where the statutory language is clear." *Ex parte Collett*, 337 U. S. 55, 93 L. Ed. 1207, 69 S. Ct. 944, 10 ALR 2d 921, citing *Gemsco, Inc. v. Walling*, 324 U. S. 244, 260, 89 L. Ed. 921, 65 S. Ct. 605:

"The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly

ambiguous significance, may furnish dubious bases for inference in every direction."

But here, as in the *Collett* case, the decision may rest on both statutory language and legislative history.

The most authoritative report bearing on the legislative history of the 1952 Act was the House Report (H. Report 1365, 82d Cong. 2d Sess. 1952) [U. S. Code Cong. and Admin. News, pp. 1653-1753], which noted

"Inequities, gaps, loopholes, and lax practices have become apparent through the years." p. 1678.³⁶

The Report contained a detailed analysis of the bill, beginning with § 101—definitions. It noted at the outset (p. 1683) that since many of the definitions "are determinative of the application of other provisions of the bill, that section must be considered as one of the most important segments of the proposed legislation."

The outlawing of the commuter practice was accomplished by several different provisions in the bill. The first such provision was also the very first definition analyzed by the House Report. It noted, referring to § 101(a)(6), defining the "border crossing identification card" that

"it seems desirable to *circumscribe* its permissible use as a means of documentation of aliens with *definite statutory limitations*." (Emphasis added.)

And those limitations were spelled out to exclude commuting aliens—residents of Mexico—from permanent resident alien status. Although prior practice recognized that commuters could use border crossing identification cards,³⁷ the new definition conspicuously omitted commuters as permissible

³⁶References are to the U. S. Code Cong. and Admin. News edition.

³⁷Report No. 1515, 81st Congress, 1950, p. 535.

holders of such cards. It limited the cards to identification of (1) the alien *lawfully* admitted for *permanent* residence—there was no such limitation in the prior statute, and (2) the “alien who is a resident in foreign contiguous territory” (a nonimmigrant).

The Report twice noted (p. 1684) that the definition of *immigrant* under the proposed bill “modifies existing law.” The manner in which it modifies existing law was carefully explained: it is in the definition of non-quota immigrant that Congress again indicated that *residence* was a *sine qua non* of immigrant status. The Report also commented on § 101(a)(27), which defined the non-quota classification, as representing a “*modification* of existing law.” (p. 1692, emphasis added.) The (B) paragraph of the definition—which had formerly provided basis for daily commuting of immigrants under the old law, read as follows in the new bill:

“* * * an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad.”

For the first time, Congress was limiting this classification to those who were admitted for *permanent residence*. The Report emphasized this by summarizing the classification as applicable to “a returning alien *resident*.” Unlike the prior Act, which was silent as to the necessity of permanent residence for immigrant status,³⁸ the new Act reiterated time and again the phrase “permanent residence,” confirming the Congressional intent that permanent residence was a requisite to the status of being lawfully admitted for permanent residence.

³⁸Cf. *Karnuth v. United States ex rel. Albro*, 279 U. S. 231, 242, 49 S. Ct. 274, *supra*.

The Report commented, for the second time on page 1684, that modification was being made in the definition of immigrant status. As if to impress the reader with the radical change being made, it declared that

“The definition of nonquota immigrant found in section 101(a)(27) contains *significant* modifications of the present definition of the term * * *

Perhaps the key word in the entire Report indicating elimination of the commuter practice was the word *precisely* as used in the following paragraph (p. 1684) :

“Section 101(a)(20) defines *precisely* the term ‘lawfully admitted for permanent residence.’ This term has special significance because of its application to numerous provisions of the bill.” (Emphasis added.)

Although “precisely” requires no definition, the definition of the root word *precise* aptly describes what Congress was intentionally doing when it “precisely” defined “lawfully admitted for permanent residence.”

“*precise* * * * Having determinate limitations; exactly or sharply defined or stated; definite; exact; not vague or equivocal; distinct * * *

Congress achieved this precision first by defining “lawfully admitted for permanent residence” in § 101(a)(20), specifying continuity as a condition—“such status not having changed,” then by separately sub-defining the words of the definition: “permanent” at § 101(a)(31) and “residence” at § 101(a)(33).

The Attorney General, through the Board of Immigration Appeals, conceded in *Matter of M D.... S.... & L.... G.... & U.... D.... C* , 8 I. & N. Dec. 209 (December 12, 1958), that the commuter “does not fit into any category found in the

³⁹Webster's Unabridged Dictionary, 2nd Ed.

immigration statutes" and that "the status is an artificial one."⁴⁰ Lacking a statutory basis, the Board could only predicate the status on "good international relations maintained and cherished between friendly neighbors." Of course, our foreign policy should be conducted through normal diplomatic channels, and international agreements should be achieved in accordance with the Constitution, U. S. Const. Art. II, § 2. But the Attorney General has been given no authority by the Congress or by the Constitution to write into the immigration statutes a category of aliens not covered by the statute which he administers. If there is need for an international arrangement to cover commuters, perhaps it should be reciprocal—which the present system is not, and certainly it should be based on the honest premise that the present law does not permit aliens admitted for permanent residence to reside in Mexico and use their I-151 cards, evidence of their status, as border crossing "work permits."

In the face of the stated Congressional intent to define *precisely* the requirements of the status of the alien admitted for permanent residence, the Attorney General has no warrant to distort the plain language of the statute. Statutory recognition of commuter status may be found only if the key words of the definition are given their opposite

⁴⁰"The commuter situation manifestly does not fit into any precise category found in the immigration statutes. The status is an artificial one, predicated upon good international relations maintained and cherished between friendly neighbors. As examples of the anomalous situation of the commuter, he cannot claim naturalization benefits since the naturalization statute by definition equates residence with domicile rather than an assimilated status (*Petition of Wright*, 42 Supp. 306; *In re Barron*, 26 F. 2d 106 (1928); *Petition of Correa*, 79 F. Supp. 265 (1948). It has also been held that a commuter is not a resident of the United States under the Selective Service regulations (32 CFR 611.13(a) (6), 611.13(b)(7), (1944), because he did not reside in the United States for the required period of 3 months. On the other hand, an alien who has the status of a commuter must notify the Commissioner of his current address in compliance with section 35 of the Alien Registration Act of 1940, as amended, and regulations issued thereunder." At p. 213.

meaning: if "lawfully" means *unlawfully*, if "privilege" means *right*, if "permanently" means *temporarily*, if "residence" does not mean *place of general abode*, and if "not having changed" means *having changed*.

Congress knowingly tightened the requirement for residence. Although it was careful to omit from the definition of "lawfully admitted for permanent residence" a description of the commuter, it wrote instead a new provision which referred to the commuter's place of residence. The two provisions, being in *pari materia*, should be read together. We refer to § 101(a)(15)(H) which conferred a new status of nonimmigrant alien on

"an alien having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform * * * temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." (Emphasis added.)

By using the phrase "residence in a foreign country which he has no intention of abandoning," the authors of the bill indicated a full appreciation of the true resident status of the commuter, and the fact that limitations were placed on the employment of such nonimmigrants proves only what the House Report stated:

"* * * It is the opinion of the committee that this provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country."⁴¹

⁴¹p. 1705 U. S. Code Cong. & Admin. News, 82nd Cong. 2nd Sess. 1952.

§ 101(a)(15)(H), § 214, and § 212(a)(14) were intended to regulate the entry and use of alien workers who retained their residence in a foreign country. The House Report noted the existing law relating to exclusion of contract laborers and other aliens induced or assisted in coming to the United States, and observed that those provisions were omitted from the new Act "*in view of the adoption of a principle of selectivity in the allocation of quota numbers or permits for temporary residence on the basis of the need for the labor and services of aliens.*" (Emphasis added.)⁴² The Report emphasized that the bill "provides strong safeguards for American labor." So long as the commuter practice continues, those "safeguards" are a nullity.

II. Appellants have standing to bring this action.

Appellees assert in their motions to dismiss that appellants have no standing to sue, that the agency decision involved herein is judicially non-reviewable and that the action presents a "political" rather than a judicial question.⁴³ All of these assertions encompass the question of whether

⁴²H.R. No. 1365, February 14, 1952, accompanying H.R. 5678, 82nd Cong., 2nd Sess.

⁴³The "political" question is hardly worthy of comment. This lawsuit knows no party lines and is no more political than any lawsuit in which government defendants are charged with improper application of a statute—incidentally, application which here was begun under a different political administration. Government defendants support their allegations with an affidavit of the Secretary of State [J.A. 83] containing hearsay, conclusions, and immaterial statements. To the extent that the trial court relied on that affidavit, if any, it was patent error. The affidavit had no legitimate place in the lawsuit, for it did not establish any material fact relating to the merits or to jurisdiction. Its filing was prejudicial and improper, and this Court will note that the Secretary of State in effect conceded that legally appellants are probably correct (his reference to an "adverse decision" and "that a judgment on the merits in this case would be undesirable * * *"). His hearsay reference to negotiations with Mexico only point up the problem; however, appellants have received no evidence of any such negotiation either then or during the year since the affidavit was filed.

jurisdiction exists in an action in the nature of mandamus, whether anyone would have standing to bring the action.

Most of these same grounds were raised in a motion to dismiss filed in *Amalgamated Meat Cutters v. Rogers*, *supra*, and were disposed of by Judge Youngdahl as follows:

"The Court has carefully examined the defendants' contentions that the plaintiff lacks standing to bring this suit, that a justiciable case has not been presented, and that not all indispensable parties are before the Court, and the Court is of the opinion they must be rejected. Cf. *Busby v. Electric Utilities Union*, 323 U.S. 72 (1944); *McGrath v. Kristensen*, 340 U.S. 162, 169 (1950); *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999 (1950); *Commercial State Bank of Roseville v. Gidney*, 174 F.Supp. 770, 780-81 (D.C.D.C. 1959), *affd.* U.S. App. D.C., 278 F.2d 871 (May 12, 1960)." 186 F. Supp. 116-117.

For the authority of the labor union to bring this action, see *U.M.W. v. Coronada Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 A.L.R. 762; *Busby v. Electrical Utility Employees Union*, 79 App. D. C. 336, 147 F. 2d 865; *El Paso Bldg. Trades Council v. Texas Highway Commission*, 231 S. W. 2d 533 (Rev. on other grounds, 234 S. W. 2d 857); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 140-141, 95 L. Ed. 817, 71 S. Ct. 624; *A.T. & Santa Fe Ry. Co. v. Summerfield*, 97 App. D. C. 325, 229 F. 2d 777, 778-779 (cert. den. 351 U. S. 926, 100 L. Ed. 1456, 76 S. Ct. 779); *Anglo-Canadian Shipping Co. v. United States*, 238 F. 2d 18 (C.A. 9); *Longshoremen v. Ackerman*, 82 Fed. Supp. 65 (D. Hawaii), reversed on other grounds, 187 F. 2d 860 (C.A. 9) (cert. den. 342 U. S. 859, 72 S. Ct. 85, 96 L. Ed. 646).

The individual appellants have standing to sue because of their peculiar and special damage resulting from the

presence of the commuters." Their interest is greater than merely ordinary public interest in obtaining enforcement of a statute. They and the appellant labor organization have no other remedy available except mandamus, which jurisdictional fact was not contested by appellees. [Complaint, ¶ 25, J.A. 22; Answers, J.A. 29 and 41.]

"It is the inadequacy, not the mere absence of other legal remedy, and the danger of a failure of justice without it that generally determines the issuance of mandamus. Such other remedy, to bar mandamus, must not only be adequate in the general sense of the term, but it must be specific and appropriate to the circumstances of the particular case; it must be a remedy that will be efficacious to afford relief upon the very subject matter involved and to enforce the right or performance of the duty in question—one to which the complaining party may at all times resort at his own option fully and freely without let or hindrance and which is available against the party from whom the duty is owing, as distinguished from one against a third person." 34 Am. Jur. 837-839.

Although appellants seek to enforce a public right, their own personal and particular rights are much more at stake.

"Although it is generally true that mandamus will not lie at the suit of an individual for the enforcement of those rights which he holds in common with the public at large, nevertheless the writ will in a proper case be granted where his personal and particular rights have been invaded beyond those that he enjoys as a part of the public and are common to everyone." 34 Am. Jur. 849.

This rule is especially well formulated in the following statement:

"* * * The authorities concur in support of the proposition that an individual may have a particular inter-

¹"The trial court granted nineteen alien commuters standing to intervene as individuals and as representatives of a class [J.A. 30, 36].

est of his own independent of that which he holds as a member of the general public, in the performance of a duty imposed by law on some officer or board, and that in such cases he is not simply an indistinguishable unit of the general public, but is in possession of a separate and peculiar right which makes him the party interested and so entitles him to seek a mandatory writ to enforce the duty * * * 35 Am. Jur. 75.

These are the rules which have traditionally and generally prevailed in mandamus actions in both state and federal courts. *Union P.R. Co. v. Hall*, 91 U.S. 343, 23 L. Ed 428; *Board of Liquidation v. McComb*, 92 U.S. 531, 23 L. Ed. 632; *Pierce v. Green*, 229 Iowa 22, 294 N. W. 237, 131 ALR 335; *De J. Cordero v. Prensa Insular De Puerto Rico, Inc.*, 169 F. 2d 229 (C.A. 1); *Atlanta Title Co. v. Tidwell*, 173 Ga. 499, 160 S. E. 620, 80 ALR 735.

"It is a rule of very general application that, where an individual has a special or peculiar interest of his own independent of that which he holds in common with the people generally, he is entitled to protect or enforce such right by mandamus, and the fact that it may be the duty of the state or of the public, acting through its officers, to take action in the matter does not defeat the right of an individual having a special interest to maintain the proceeding * * * 55 C.J.S. 79.

It is, of course, a ministerial rather than a discretionary duty with which we are concerned. The law either does or does not require *actual* residence in the United States as a condition to maintaining the status of being lawfully admitted for permanent residence. There is no fact issue involved here, for the appellees admit that the present practice does not require commuters to reside in the United States. Thus, mandamus is appropriate.

Furthermore, the Administrative Procedure Act [Title 5 U.S.C. § 1009(a), (c), and (e)] authorizes the action and the remedy.

§ 10(a): "*Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.*"

* * * * *

§ 10(c): "*Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.*"

* * * * *

§ 10(e): "*So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any Agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, or privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitation, or short of statutory right; without observance of procedure required by law * * **" (Emphasis added.)

The Court of Appeals for the Fifth Circuit recently construed these review and remedy provisions of the Administrative Procedures Act in relation to the Immigration and Nationality Act of 1952 in *Estrada v. Ahrens, District Director of Immigration and Naturalization Service*, 296 F. 2d 690 (C.A. 5), the Court held as follows:

"* * * Taken together, the effect of the Administrative Procedure Act and the Immigration Act is to make available judicial review of agency action relating to

immigration by suits for a declaratory judgment and for mandatory and prohibitory injunctions, and to enlarge the scope of review. See Jafee, *The Right to Judicial Review*, 71 Harv. L. Rev. 769, 792 (1958).

* * *

"* * * If Estrada's plight resulted from a government official's misconstruction of the statute, the official exceeded his statutory authority. *A court of law is the proper place to test 'unauthorized administrative power'.* Under Section 10(a) of the Act Estrada is entitled to a judicial test of the administrative action by which he is 'affected or aggrieved'. He is entitled to a determination of his status, and under Section 10(e) the reviewing court may 'compel agency action unlawfully withheld'." (Emphasis added.)

Cf. Rusk v. Cort, 369 U. S. 367, 7 L. Ed. 2d 809, 82 S. Ct. 787; *American Trucking Ass'n v. United States*, 364 U. S. 1, 18, 4 L. Ed. 2d 1527, 80 S. Ct. 1570.

The Court in the *Estrada* case cited *Stark v. Wickard*, 321 U. S. 288, 64 S. Ct. 559, 571, 88 L. Ed. 733, which is especially applicable to the instant action. The Supreme Court there held that the general equity jurisdiction of the District Court for the District of Columbia authorized it to hear an action to enjoin the Secretary of Agriculture from enforcing certain allegedly illegal provisions of a milk marketing order. The Secretary of Agriculture contested jurisdiction on essentially the same ground raised herein by the Attorney General. The Court held that when a complainant possesses "something more than a general interest in the proper execution of the laws" he has standing to obtain judicial intervention:

"His interest must rise to the dignity of an interest personal to him and not possessed by the people gen-

⁴⁵"* * * the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions under the 1952 [Immigration and Nationality] Act in the absence of clear and convincing evidence that Congress so intended." 369 U. S. 379-380.

erally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers." 321 U.S. 288, 304.

* * * * *

"* * * When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf. *United States v. Morgan*, 307 U.S. 183, 190, 191, 59 S.Ct. 795, 799, 83 L.Ed. 1211 * * *" 321 U.S. 288, 309, 310.

The foregoing analysis ought to be sufficient to show that the Court has jurisdiction and that the appellants have standing to bring the action. However, there is another aspect which is equally compelling in arriving at the same result. This is, that appellants complain of both action and inaction by the Attorney General. Appellants complain of the illegality of conferring permanent resident alien status on commuters, but also of the failure of the Attorney General to apply the affirmative provisions of § 101(a)(15)(H)(ii) and § 214 (a), (b), and (c) of the Act, provisions which were written and amended at the behest of organized labor (see *Legislative History, supra*). Organized labor certainly is a proper party to complain of the failure to enforce such provisions.

In summation as to the question raised about standing of appellants to sue, we suggest this analysis of the problem which the lawsuit attacks: First, it is a public problem which affects the public generally. Second, it is a problem

which especially concerns working people, both organized and unorganized, for it creates low wages and unemployment. Third, it is a problem which directly affects a specific class of working people, among whom are numbered the individual appellants, those who live in communities of the United States bordering on Mexico. Fourth, the problem affects organized labor, especially organized labor affiliated with and represented by the appellant Texas-State, AFL-CIO, for it directly contributes to low wages, unemployment, organizational difficulties, and strike breaking. Thus, appellants have an interest which vastly transcends the interest of the public at large. Certainly, if appellants have no standing to bring this action, then the pertinent provisions of the statute are truly unreviewable, a condition which the Constitution does not contemplate with its separation of powers among the legislative, executive, and judicial branches.

CONCLUSION

For the foregoing reasons, appellants respectfully pray that the judgment of the Court below be reversed, and that the case be remanded for disposition in accordance with the conclusions of law stated herein.

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September 10, 1963.

APPENDIX

Statutes Involved

The following provisions of the Immigration and Nationality Act (Act of June 27, 1952, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*) are involved:

8 U.S.C. § 1101 [Sec. 101]. Definitions

(a) As used in this chapter—

* * * * *

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations.

* * * * *

(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

* * * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

* * * * *

(B) An alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

* * * * *

(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land tempo-

rarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

* * * * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as an industrial trainee;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him.

(16) The term "immigrant visa" means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens.

* * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21) The term "national" means a person owing permanent allegiance to a state.

(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

* * * * *

(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27) The term "nonquota immigrant" means—

(A) an immigrant who is the child or the spouse of of a citizen of the United States;

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(C) an immigrant who was born in Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and the spouse or the child of any such immigrant, if accompanying or following to join him;

* * * * *

(F) (i) an immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of minister of a religious denomination, and whose services are needed by such religious denomination having a bona fide organization in the United States; and (ii) the spouse or the child of any such immigrant, if accompanying or following to join him; or

* * * * *

(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32) The term "quota immigrant" means any immigrant who is not a nonquota immigrant. An alien who is not particularly specified in this chapter as a nonquota immigrant or a nonimmigrant shall not be admitted or considered in any manner to be either a nonquota immigrant or a nonimmigrant notwithstanding his relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 1482 and 1484 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

8 U.S.C. § 1181 [Sec. 211]. Admission into the United States
—Documentary requirements

(a) No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such immigrant visa of the accompanying parent, (2) is properly chargeable to the quota specified in the immigrant visa, (3) is a nonquota immigrant if specified as such in the immigrant visa, (4) is of the proper status under the quota specified in the immigrant visa, and (5) is otherwise admissible under this chapter.

Readmission after temporary departure

(b) Notwithstanding the provisions of section 1182(a) (20) of this title, in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

* * * * *

(e) Every alien making application for admission as an immigrant shall present a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General.

8 U.S.C. § 1182 [Sec. 212]. Excludable classes of aliens; non-applicability to certain aliens

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply only to the following classes: (i) those aliens described in the non-preference category of section 1153(a) (4) of this title, (ii) those aliens described in section 1101(a) (27) (C), (27) (D), or (27) (E) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence, unless their services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interest or welfare of the United States;

* * * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(e) of this title;

* * * * *

(25) Aliens (other than aliens who have been lawfully admitted for permanent residence and who are returning from a temporary visit abroad) over sixteen years of age, physically capable of reading, who cannot read and understand some language or dialect;

(26) Any nonimmigrant who is not in possession of (A) a passport valid for a minimum period of six months from the date of the expiration of the initial period of his admission or contemplated initial period of stay authorizing him to return to the country from which he came or to proceed to and enter some other country during such period; and (B) at the time of application for admission a valid non-immigrant visa or border crossing identification card;

* * * * *

(c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under

an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

**8 U.S.C. § 1184 [Sec. 214]. Admission of nonimmigrants—
Regulations**

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

Presumption of status; written waiver

(b) Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a) (15) of this title. An alien who is an officer or employee of any foreign government or of any international organization entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act, or an

alien who is the attendant, servant, employee, or member of the immediate family of any such alien shall not be entitled to apply for or receive an immigrant visa, or to enter the United States as an immigrant unless he executes a written waiver in the same form and substance as is prescribed by section 1257(b) of this title.

(c) The question of importing any alien as a nonimmigrant under section 1101(a) (15) (H) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

8 U.S.C. § 1201 [Sec. 221].

* * * * *

Non-issuance of visas or other documents

(g) No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or

any other provision of law: *Provided*, That a visa or other documentation may be issued to an alien who is within the purview of subsection (a) (7) or (15) of section 1182 of this title, if such alien is otherwise entitled to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title.

Nonadmission upon arrival

(h) Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to enter the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law. The substance of this subsection shall appear upon every visa application.

8 U.S.C. § 1202 [Sec. 222]. Application for visas—Immigrant visas

(a) Every alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed. In the application the immigrant shall state his full and true name, and any other name which he has used or by which he has been known; age and sex; race and ethnic classification; the date and place of his birth; present address and places of previous residence; whether married or single, and the names and places of residence of spouse and children, if any; calling or occupation; personal description (including height, complexion, color of hair and

eyes, and marks of identification) ; languages he can speak, read, or write; names and addresses of parents, and if neither parent living then the name and address of his next of kin in the country from which he comes; port of entry into the United States; final destination, if any, beyond the port of entry; whether he has a ticket through to such final destination; whether going to join a relative or friend, and, if so, the name and complete address of such relative or friend; the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to remain in the United States permanently; whether he was ever arrested, convicted or was ever in prison or almshouse; whether he has ever been the beneficiary of a pardon or an amnesty; whether he has ever been treated in an institution or hospital or other place for insanity or other mental disease; if he claims to be a preference quota or a nonquota immigrant, the facts on which he bases such claim; whether or not he is a member of any class of individuals excluded from admission into the United States, or whether he claims to be exempt from exclusion under the immigration laws; and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.

* * * * *

Signing and verification of application

(e) Except as may be otherwise prescribed by regulations, each copy of an application required by this section shall be signed by the applicant in the presence of the consular officer, and verified by the oath of the applicant admin-

istered by the consular officer. One copy of the application for an immigrant visa, when visaed by the consular officer, shall become the immigrant visa, and the other copy shall be disposed of as may be by regulations prescribed. The application for a nonimmigrant visa or other documentation as a nonimmigrant shall be disposed of as may be by regulations prescribed. The issuance of a nonimmigrant visa shall, except as may be otherwise by regulations prescribed, be evidenced by a stamp placed by the consular officer in the alien's passport.

8 U.S.C. § 1203 [Sec. 223]. Re-entry permit—Application; contents

(a) (1) Any alien lawfully admitted for permanent residence, or (2) any alien lawfully admitted to the United States pursuant to clause 6 of section 3 of the Immigration Act of 1924, between July 1, 1924, and July 5, 1932, both dates inclusive, who intends to depart temporarily from the United States may make application to the Attorney General for a permit to reenter the United States, stating the length of his intended absence or absences, and the reasons therefor. Such applications shall be made under oath, and shall be in such form, contain such information, and be accompanied by such photographs of the applicant as may be by regulations prescribed.

Issuance of permit; extension

(b) If the Attorney General finds (1) that the applicant under subsection (a) (1) of this section has been lawfully admitted to the United States for permanent residence, or that the applicant under subsection (a) (2) of this section

has since admission maintained the status required of him at the time of his admission and such applicant desires to visit abroad and to return to the United States to resume the status existing at the time of his departure for such visit, (2) that the application is made in good faith, and (3) that the alien's proposed departure from the United States would not be contrary to the interests of the United States, the Attorney General may, in his discretion, issue the permit, which shall be valid for not more than one year from the date of issuance: *Provided*, That the Attorney General may in his discretion extend the validity of the permit for a period or periods not exceeding one year in the aggregate. The permit shall be in such form as shall be by regulations prescribed for the complete identification of the alien.

Multiple reentries

(c) During the period of validity, such permit may be used by the alien in making one or more applications for reentry into the United States.

Presented and surrendered

(d) Upon the return of the alien to the United States the permit shall be presented to the immigration officer at the port of entry, and upon the expiration of its validity, the permit shall be surrendered to the Service.

Permit in lieu of visa

(e) A permit issued under this section in the possession of the person to whom issued, shall be accepted in lieu of any visa which otherwise would be required from such person under this chapter. Otherwise a permit issued under

this section shall have no effect under the immigration laws except to show that the alien to whom it was issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning.

8 U.S.C. § 1259 [Sec. 249]. Record of admission for permanent residence in the case of certain aliens who entered the United States prior to July 1, 1924

(a) A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, if no such record is otherwise available and such alien shall satisfy the Attorney General that he—

- (1) entered the United States prior to July 1, 1924;
- (2) has had his residence in the United States continuously since such entry;
- (3) is a person of good moral character;
- (4) is not subject to deportation; and
- (5) is not ineligible to citizenship.

(b) An alien in respect of whom a record of admission has been made as authorized by subsection (a) of this section, shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of his entry prior to July 1, 1924.

8 U.S.C. § 1329 [Sec. 279]. Jurisdiction of District Courts

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title. It shall be the duty of the

United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 275 or 276 may be apprehended. No suit or proceeding for a violation of any of the provisions of this title shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuances shall be entered of record with the reasons therefor.

The following provisions of the Administrative Procedure Act are also involved:

5 U.S.C. § 1001 [Sec. 2, 1946, 60 Stat. 237]. Definitions

As used in this Act—

* * * * *

(c) Rule and rule making.—“Rule” means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. “Rule making” means agency process for the formulation, amendment, or repeal of a rule.

* * * * *

5 U.S.C. § 1002 [Sec. 3, 60 Stat. 238]. Public Information

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency—

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

* * * * *

5 U.S.C. § 1003 [Sec. 4, 60 Stat. 238]. Rule Making

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

* * * * *

U.S.C. § 1009 [Sec. 10, 60 Stat. 243]. Judicial Review

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

* * * * *

(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, find-

ings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The following jurisdictional statutes are also involved:

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

28 U.S.C. § 1331. Federal question; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and

costs, and arises under the Constitution, laws, or treaties of the United States. * * * As amended July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

28 U.S.C. § 1294. Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; * * *

As amended Oct. 31, 1951, c. 655, § 50(a), 65 Stat. 727; July 7, 1958, Pub.L. 85-508, § 12(g), 72 Stat. 348; Mar. 18, 1959, Pub.L. 86-3, § 14(c), 73 Stat. 10; Aug. 30, 1961, Pub.L. 87-189, § 5, 75 Stat. 417.

REPLY BRIEF FOR APPELLANTS

In the

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17,976

TEXAS STATE AFL-CIO, ANTONIO AGUILAR,
JULIA AMAYA, et al,

Appellants,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, AND
RAYMOND F. FARRELL, COMMISSIONER OF
IMMIGRATION AND NATURALIZATION,
Government Appellees,

and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES
(LEYVA), CONCEPCION AURORA CAGIGAS FRAIJO, et al,
Intervenor Appellees,

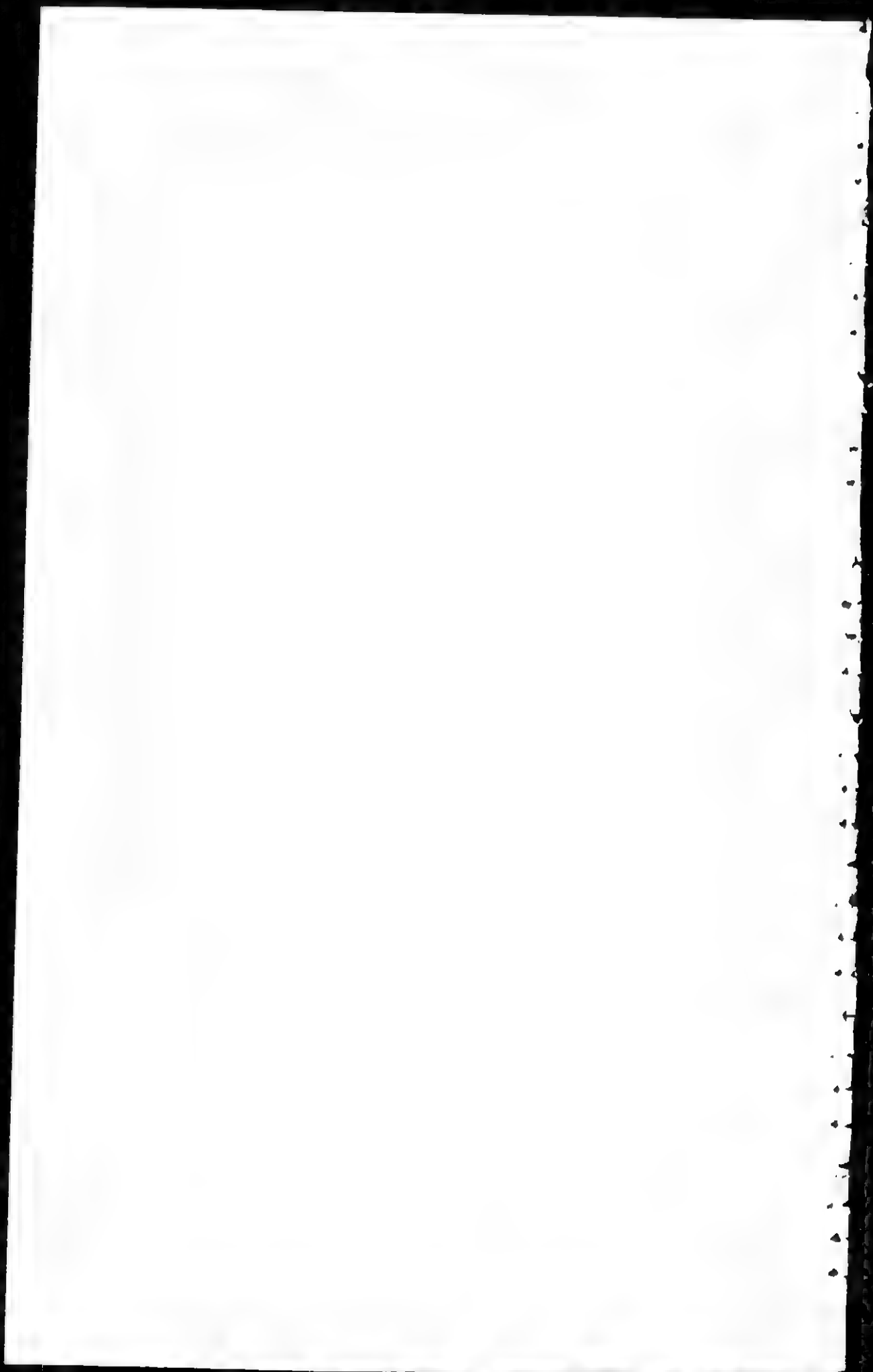
**On Appeal From Judgment of District Court of District
of Columbia Dismissing Action**

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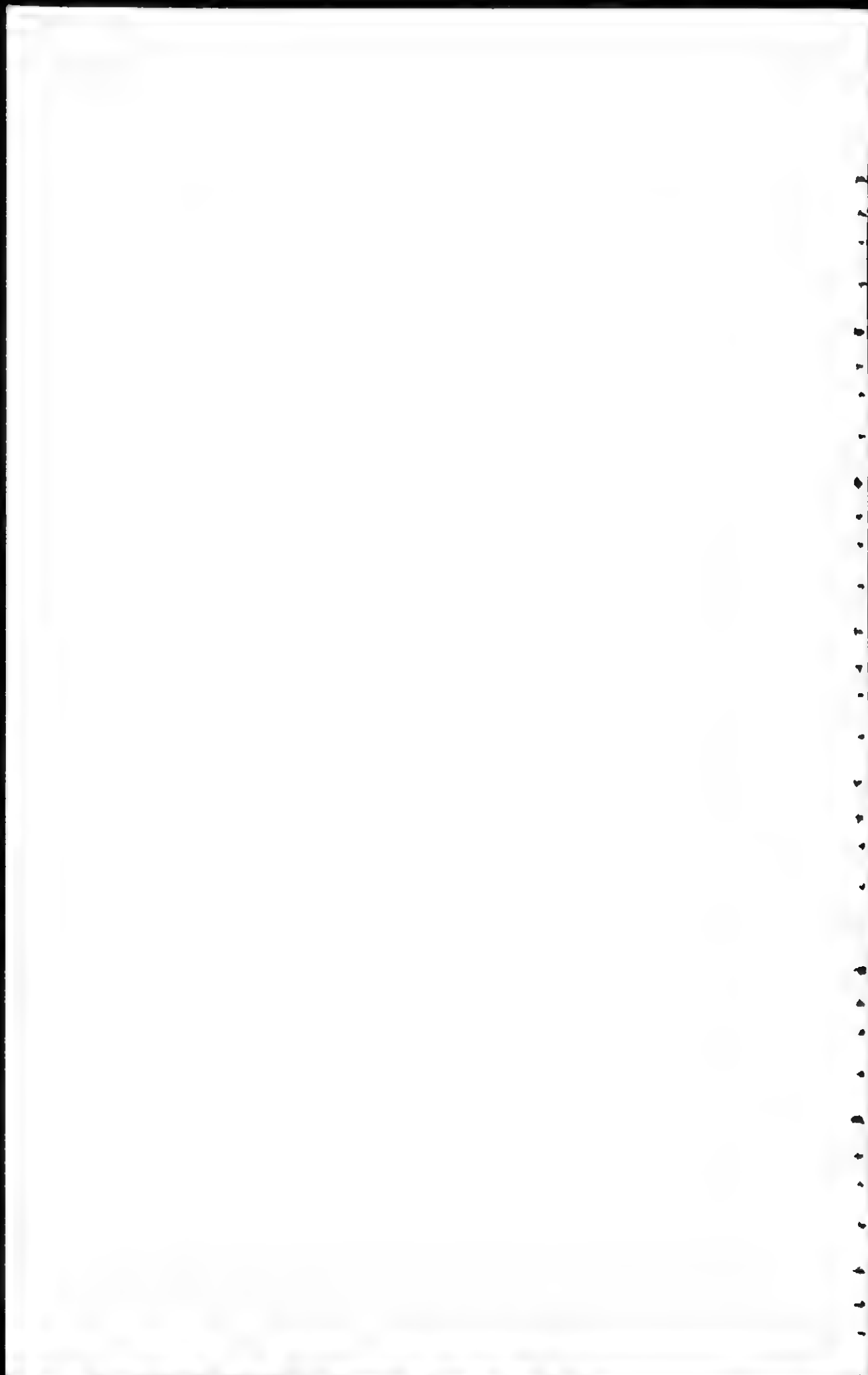
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and

**THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES
(LEYVA), CONCEPCION AURORA CAGIGAS FRAIJO, et al,**
Intervenor Appellees,

**On Appeal From Judgment of District Court of District
of Columbia Dismissing Action**

**I. WHETHER THE COMPLAINT STATES A CLAIM
UPON WHICH RELIEF CAN BE GRANTED**

Understandably, appellees have sought to minimize the principal question by relegating it to the last pages of their briefs. But as we shall note later, issues which appellees have emphasized relate to jurisdiction, and, in so far as they are issues, are issues of fact which cannot be resolved except in appellants' favor on the present state of the record. We shall, therefore, turn our first attention to the only point on which the Court below, in the absence of a resolution of conflicting facts, could have based its ruling: whether (in the words of the intervenors) "the complaint fails to state a claim upon which relief can be granted."

¹ Intervenor's brief, p. 3

The governments' "counterstatement of questions presented" tells much about the inherent weakness of the government's case. It is based on the law and practice under the 1924 immigration statute, not upon provisions of the 1952 Immigration and Nationality Act. Paragraph 5 of the government's counterstatement poses the question of whether "the long-standing *administrative* application of the immigration law . . . is correct as a matter of law?" (Emphasis added) Nowhere in the statement is there an unequivocal assertion that the 1952 Act legalizes recognition of nonresident commuters as aliens lawfully admitted for permanent residence; and the entire brief follows the same pattern. The gist of appellees' argument is that the commuter system is legal because it has been permitted administratively for a long time. But the Court will seek in vain for any authoritative statement that the system is legal because the 1952 Act says it is legal. The most appellees contend is that the practice was *undisturbed* by the 1952 Act.

To achieve such a conclusion, appellees have filled their briefs with historical data—some of it outside the record and some of it patently incorrect, but most of it beside the point. But mainly, they have ignored the fact that an entirely new statute with new definitions was enacted in 1952, and that Congress did not intend the old cliches to have validity except where they were expressly written into the new law.

Thus, appellees' briefs are noteworthy more for what they fail to say than for what they say; and despite the extraordinary length of government appellees' brief, most of appellants' arguments remain unanswered. Both sets of appellees have ignored unanswerable statutory language, key cases, and clearly stated legislative history—presumably on the theory that if these matters are ignored they

might go away. No amount of diversionary discussion will make them go away.

A. Legislative History

Outstanding among the ignored items is the legislative history referred to at pages 30 through 32 of appellants' brief. Government appellees insist that the 1952 Act "codified the pre-existing immigration statutes,"² and "carries forward essentially unchanged the technical applications given under the 1924 Act to the terms 'immigrant,' 'lawfully admitted for permanent residence,' 'returning immigrants,' and 'border-crossing identification card.'"³ The specific legislative history is contra.

Government appellees do not contest the statement that "The most authoritative report bearing on the legislative history of the 1952 Act was the House Report."⁴ However, they charge appellants with "confusion as to the use of the word 'precisely' in the Committee state,"⁵ wherein the Committee asserted that

"Section 101(a) (20) defines precisely the term 'lawfully admitted for permanent residence.' This term has special significance because of its application to numerous provisions in the bill."

Government appellees contend that appellants "do not want to accept this as the *precise* technical meaning the Congress—carrying forward the prior law—assigned the *status* of a lawfully admitted 'immigrant' in the United States." We submit that we are unable to fathom the meaning of that statement, and the situation is not helped by the government's failure to provide supporting authority.

There is no need to obfuscate, for the statutory

² Government brief, p. 51.

³ Ibid, pp. 53-54.

⁴ Government brief, p. 30.

⁵ Government brief, p. 58.

language is clear. But Congress made doubly certain of its meaning by telling us, through the Committee Report, that the definition of *immigrant* in the 1952 Act "modifies existing law"⁶—contrary to the repeated assertion in appellees' briefs—and particularly that

"The definition of nonquota immigrant found in 101(a) (27) contains *significant modifications of the present definition of the term* which will be discussed hereinafter more fully in connection with the admissible classes of aliens." (Emphasis added)⁷

Under the heading of "Admissible Classes of Aliens" the Report stated that

"The immigrant class includes those aliens who seek to enter the United States *for permanent residence*, while the non-immigrant class includes those aliens who seek to enter for temporary periods of stay." (Emphasis added)⁸

Under the same heading, in discussing "nonquota immigrants [sec. 101 (a) (27)]" the Report emphasized that

"The nonquota classification of aliens under the bill, as set forth in the definition in section 101 (a) (27) represents a *modification* of existing law. Provision is made for the admission without quota charge of an immigrant who is . . . (2) a returning alien *resident*; . . ." (Emphasis added)⁹

Notwithstanding such Congressional announcement that these provisions modify existing law, government appellees continue to allege indifferently that this same provision [§101(a) (27) (B)]

⁶ House Report, 1365, 82d Cong. 2d Sess. 1952. U.S. Code & Cong. News. p. 1684

⁷ Ibid.

⁸ Id., p. 1689.

⁹ Id., p. 1692

“carries this nonquota ‘immigrant’ classification forward into current law *without change*.” (Emphasis added) ¹⁰

The change was significant. See appellants’ brief, page 26. Yet appellees offer no explanation for such change, except to insist there was really no change.

Appellees have cited the 1950 Senate Report¹¹ not for the purpose of showing a Congressional intent to retain the commuter system, but rather to show a Congressional awareness that commuters existed. The passages quoted from pages 535-536 and 616 of that Report, however, are from descriptive material relating to non-immigrant border crossers. The 1950 Report contains absolutely no mention of commuters in its discussion of immigrants, nonquota immigrants and returning resident aliens. In fact, the discussion under “Nonquota Classification of Returning Alien Residents” positively indicated that the then existing regulations required that a returning alien resident establish “(1) previous lawful admission to the United States for permanent resident, (2) departure from the United States with the *intention of returning to reside therein*, (3) an *unrelinquished domicile in the United States*, and (4) that any protracted stay abroad was caused by justifiable reasons over which he had no control.”¹² Thus, said Report does not show that Section 4(b) of the 1924 law was being used as a “fiction” to allow aliens admitted for permanent residence to commute to jobs in the United States without having “an unrelinquished domicile in the United States.” The Report, however, did express concern about the “large volume of nonquota immigration,” and recommended its regulation by

¹⁰ Government brief, p. 57.

¹¹ S. Rep. No. 1515, 81st Cong. 1950.

¹² Ibid, p. 471.

"qualitative restrictions in the law."¹³ The new provisions written into §101(a)(27)(B) are certainly the type of *qualitative* restrictions to which the Report referred.

The fact that appellees have generally ignored the most authoritative sources of legislative history, (the House, Senate and Conference Committee reports submitted contemporaneously with passage of the 1952 Act) and have favored instead some vague language in the 1950 Senate Report, points up that appellees must grasp at straws. But appellees failed to apprise the Court that substantial changes were written into the draft bill subsequent to the preparation of Senate Report 1515, between 1950 and 1952, including changes which "beefed up" the language requiring residence as an actual condition for status as an alien admitted for permanent residence. Thus, if Congress had any doubt whether the original draft bill¹⁴ accompanying Senate Report 1515 eliminated immigrant status for commuters, that doubt was dispelled by new language in the bill which finally became law and by the committee reports filed in 1952.

For example, in the 1950 bill the term "residence" was defined as

"the place of general abode; the place of general abode of a person means the principal dwelling place."¹⁵

The 1952 Act, however, augmented that definition by changing the language to read

"the place of general abode; the place of general abode of a person means his principal, *actual* dwelling place *in fact, without regard to intent.*" (Emphasis added)¹⁶

¹³ Ibid, p. 474.

¹⁴ S. 3455, 81st Cong. 2d. Sess. introduced by Senator McCarran.

¹⁵ Ibid, §101(a) (34)

¹⁶ §101 (a) (33).

Another example was that the 1950 bill contained the following provision governing readmission, after temporary absence, of aliens who have the status of permanent residents:

"In such cases or in such classes of cases and under such conditions as may be by regulations prescribed, otherwise admissible aliens *who have the status of lawful permanent residents of the United States* and who depart therefrom temporarily may be readmitted to the United States by the Commissioner in his discretion without being required to obtain a passport, immigrant visa, reentry permit, or other documentation." (Emphasis added)¹⁷

The 1952 Act changed that provision as follows in order to emphasize the requirement of actual "residence" rather than "status:"

"Notwithstanding the provisions of section 212(a) (20) of this Act, in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, otherwise admissible aliens *lawfully admitted for permanent residence* who depart from the United States temporarily may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit, or other documentation." (Emphasis added)¹⁸

A similar change was made in §212(a) (29) (C) which read as follows in the 1950 bill:

"Aliens *who have the status of lawful permanent residents* who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Com-

¹⁷ S. 3455, *supra*, §211 (b)

¹⁸ §211(b).

missioner without regard to the provisions of paragraphs (1) through (25) of subsection (a)." (Emphasis added)

In the 1952 Act that provision was modified to read as follows:

"Aliens *lawfully admitted for permanent residence* who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b)." (Emphasis added)

The foregoing changes, in addition to those already noted in appellants' original brief, show a consistent Congressional purpose to require actual residence as a condition of permanent resident alien status. Congress spelled out, in unmistakable words, that the *purpose* for which the alien was being admitted was for *permanent residence*, and no provision was made for admission of immigrants for employment only or for any other non-residential purpose. The purpose for *permanent residence* means for that purpose and certainly for no other purpose.

Appellees do not actually ignore the definition of "residence" in §101(a) (33), although their respective but different treatments of that definition illustrate how ordinary language must be distorted and disregarded in order to support their position.

In footnote 71 of their brief, the government recognizes, on the authority of the House and Senate

Reports, that the term "residence" in §101(a) (33) of the 1952 Act was a codification of the judicial construction of the term expressed by the Supreme Court in *Savorgnan v. United States*, 338 U.S. 491, 505 (1950), which arose under the Nationality Act of 1940, 54 Stat. 1137, *et seq*, former 8 U.S.C. 501, *et seq*. Congress thereby announced its intent to apply the same strict rule of residence for all purposes wherever the term appears in the 1952 Act, for §101 is the general definitions section and is applicable to the entire statute. The government simply ignores the implication of this legislative history; intervenors, however, arrive at the remarkable conclusion that the definition meant the opposite of its history and its plain meaning. In footnote 7 of their brief, intervenors insist

"... that the definition of 'residence' is set forth in the definitions section of the statute *in order to define that term in connection with the 'residence' requirements of §316 (a), 8 U.S.C. §1427 (a) (1958) [the Naturalization Section]*. (Emphasis added)

Such a construction is impossible. (1) It leaves the word "residence" undefined in at least half a hundred places where it appears in the Act, (2) it fails to explain why it appears in the general definition section (§101) instead of in the naturalization section (§316), where some additional residence requirements are stated, and (3) it fails to explain why Congress wrote it as a definition of general application rather than specifying a limitation on its application.

Giving the definition its clear and plain meaning it simply says that residence means the place where a person generally lives, his actual dwelling place without regard to intent. Intervenor commuters, like the entire class they purportedly represent,

maintain their dwelling places in Mexico, and definition of residence precludes reliance on place of employment in lieu of place of general abode.

B. §101(a)(32) Abolishes Non-Statutory Categories of Immigrants

Appellees have not pointed to a single provision of the Act which confers immigrant status on non-residents who have no intent to reside in the United States. But even their silence speaks for them. *Among the combined 94 pages of appellees' briefs there is not a single word devoted to §101(a)(32), the provision which abolished all non-statutory categories of immigrants.* Since commuters are not "particularly specified" in the Act, either by that terminology or any other terminology, they may not be "*considered in any manner to be either a non-quota immigrant or a non-immigrant.*" See page 23 of appellants' original brief.

Appellees insist on trying this case under the 1924 Act. At page 44 of the government's brief, the appellants are charged with contending that Congress "adopted the ordinary meaning of the term 'immigrant'." That is nonsense. Congress simply adopted a reasonably clear statute which, like the 1924 Act, "made its own definition" of immigrant. Appellees seem to overlook the fact that the *Albro* case" only

¹⁹ *Karnuth v. United States, ex rel. Albro*, 279 U.S. 231 (1929), 49 S.Ct. 274. Appellees have taken surprising liberties in reporting this case. At page 13 of their brief, intervenors assert that "The 1927 classification of commuters as 'immigrants' was challenged in the courts. The classification was upheld by the Supreme Court in *Karnuth v. United States ex rel. Albro*, [citation] . . . The Supreme Court, in sustaining the Administrator's view that commuters were immigrants, stated: [quoting] . . ." (Emphasis added). The Supreme Court in *Albro* was not construing General Order 86, rather it was construing §3(2) of the 1924 Act: ". . . and the case is therefore narrowed to the simple inquiry whether the word 'business,' as used in the statute, includes ordinary work for hire." The Court ruled that it did not. Government appellees are also misleading about the case, for at page 46 of their brief they imply that General Order 86 was at issue in *Albro*, which of course, it was not. The truth of the matter is that the commuter system was never judicially tested under the 1924 Act, and there is certainly no reason to expand *dictum* relating to a prior and different statute into a universal principle which transcends the expressed will of Congress.

construed statutory language, and the language which the Supreme Court construed was not reenacted in the 1952 Act. Instead, it was substantially modified, as we have pointed out elsewhere.²⁰ Appellees seem unable to face up to the fact of such modification, for they have no answer to the clear provision of §101(a)(32) which abolishes non-statutory categories, and requires that for an alien to be "considered in any manner" as either a non-quota immigrant or a non-immigrant he must be "particularly specified" in the Act.

The Court will note that appellees do not contest the fact that commuters are not "particularly specified" in the Act. Nor is the government likely to contest it, for the Attorney General, through the Board of Immigration Appeals, is already on record in *Matter of M—D—S—& L—G—& W—D—C*, 8 I. & N. Dec. 209 (1958),²¹ that "The commuter situation manifestly does not fit into any precise category found in the immigration statutes." That decision called the commuter status "artificial." See pp. 32-33 of appellants' original brief.

C. Restrictions on Border Crossing Identification Cards

Appellees also fail to explain the Act's new restrictions on border crossing identification cards. Although the 1950 Senate Report (See appellants' original brief, p. 30) recognized that a commuter who had been "admitted for lawful permanent residence but who resides in foreign contiguous territory" was in possession of a border crossing identification card, the 1952 Act conspicuously omitted the commuter class from the definition of "border crossing identification card." §101(a)(6) designated it as identification not to an alien who had the

²⁰ See especially pp. 24, 26, and footnote 27 of appellants' original brief.

²¹ This important case was also ignored by appellees' briefs.

status of being admitted for permanent residence but rather "to an alien who is lawfully admitted for permanent residence." (Emphasis added). Congress recognized²² that this changed the former practice whereby I-151 cards were given to residents and commuters alike, for it gave as its explanation of the provision that

"it seems desirable to circumscribe its permissible use as a means of documentation of aliens with definite statutory limitations."²³

Having taken such pains to require these "definite statutory limitations" and having enacted a provision that an alien could not be "considered in any manner to be either a nonquota immigrant or a non-immigrant" unless "particularly specified" in the Act, Congress certainly could not have intended to retain the commuter immigrant classification, especially when the Attorney General admits that the classification is "artificial" and "does not fit into any precise category found in the immigration statutes."²⁴

D. Failure to Reenact Commuter Regulations

Appellees also offer no excuse for failure of the Attorney General to comply with §4 of the Administrative Procedure Act [5 U.S.C. §1003] in creating, wholly by administrative action, the commuter classification with its attendant procedures and practices. See appellants' brief, pp. 25-26.

Most telling of all, however, is the utter inability of appellees to account for the repeal of the federal

²² U. S. Code Cong. and Admin. News, p. 1683 [House Report].

²³ Notwithstanding this Committee statement of intent to "circumscribe" the permissible use of the cards, government appellees write in their brief that "Congress carried forward the prior recognition given the border-crossing identification card as a valid entry document for both 'immigrants' and 'non-immigrants'." A comparison of the definition in the Omnibus Report (pp. 535) indicates the change, still unexplained despite the effort in footnote 80 of government appellees' brief.

²⁴ *Matter of M— D— S— & L— G— & W— D— C—*, supra.

regulation governing commuters, without subsequent reenactment either by new regulation or by statute. Government appellees offer a truly ingenious explanation of the omission:

"Because the Act itself codified into statutory form most of the administrative interpretations and practices evolved under the pre-existing immigration statutes, the Administrators found it unnecessary to issue such detailed regulations as had previously been in effect. The new regulations issued to implement that Act were limited to essentials only."²⁵

The only thing wrong with this explanation is its disregard for known facts. In the first place, the Administrators issued extremely detailed regulations, if anything, more detailed than those previously in existence, comprising 306 printed pages without pocket parts. In the second place, if the Act itself codified into statutory form most of the administrative interpretations and practices under the previous statutes, why was 8 C.F.R. 110.6 not written into statutory language in the same manner as many other regulations? But since it was not written into the new Act, and since there was no statutory basis in the new Act for the commuter practice, how could 8 C.F.R. 110.6 or a similar regulation fail to be an "essential" regulation? Where does one go to find out that "an alien admitted for permanent residence" does not have to reside in the United States but may continue to reside in Mexico and enter the United States daily for employment purposes only? There is no obvious place to go for

²⁵ Government brief, p. 62.

such information.²⁶ The fact is, neither the Act nor the regulations supplies such an answer, and for the government appellees to confer immigrant status on commuters without benefit of statute or regulation flagrantly violates both the spirit and the letter of the Administrative Procedure Act.

At page 63 of their brief, government appellees stated that they "repeat for emphasis: Appellants are completely wrong in their statement that at or near the time of the enactment of the statute . . . the Administrators of the Immigration and Naturalization Service did not consider commuters to be aliens of the immigrant class." "Repeating" may be the only emphasis available to appellees, for the unfuted facts—ignored by appellees—are the following: (1) 8 C.F.R. 110.6 was repealed; (2) no commuter regulation was reissued; (3) on October 14, 1953—sixteen months after passage of the Act—a special inquiry officer pursuant to §236 of the Act rendered a decision that H— O—, a commuter, was excludable under §212(a)(20) notwithstanding that he had been originally admitted for permanent residence in 1942 and since that time had resided in Mexicali, B.C., Mexico, and worked in the United States; and (4) for the first two years after passage of the Act there was no decision—either judicial or administrative—which recognized commuters to be immigrants under the 1952 Act.²⁷

Appellees argue that "It is obvious that Inter-

²⁶ Since passage of the 1952 Act, the commuter practice, until recently, was a rather well guarded secret—from both Congress and the public. None of the Annual Reports of the Immigration and Naturalization Service explained the practice—or for that matter even conceded that the practice existed. And not until June 24, 1963, was Congress apprised of the practice, and this came about only through the self-serving report filed after judgment of the Court below in the instant case. Said report may be found in H. Comm. on Judiciary, Subcommittee No. 1, Study of Population and Immigration Problems, Administrative Presentations (III) (1963), p. 155.

²⁷ Government appellees' statement of appellants' position (at page 62 of their brief) that no question was raised for two years after passage of the Act grossly misquotes our brief and reverses the true situation.

venor appellees continued to exercise their right to commute." It may have been obvious to these commuters, but there is no showing in this record that it was obvious to anyone having authority in the agency. Not a single one of the intervenors acquired commuter status or immigrant status after passage of the 1952 Act and prior to the Board of Immigration Appeals' decision in *Matter of H— O—* (J.A. 42-66). Furthermore, there were not any large numbers of commuters until after 1954 when the border was closed to wetbacks,²⁸ and it was common practice for commuters to give false United States addresses.²⁹

E. Actual Residence Required Under §101(a)(20)

Our list of undisputed points continues. At page 19 of appellants' original brief, §249 of the Act and 8 C.F.R. 4.2 of the 1952 regulations were cited as additional proof that §101(a)(20) requires actual residence in the United States, for those provisions enumerated the requisites for supplying a missing record of permanent resident alien status, and *continuous* residence and non-abandonment of the status are specified. Appellees offer no contrary explanation.

Likewise they ignore all the cases on pages 20 and 21 of our brief, to the effect that a resident must maintain residence in the United States or be denied entry. They also ignore the Board of Immigration Appeals' decisions enumerated on page 21 relating to abandonment of commuter status.

What they do say, however, is that

"... an alien lawfully admitted as an 'immigrant' thereafter acquires a recognized 'status' in the United States. He is entitled to the privilege

²⁸ See footnote 9, appellants' original brief.

²⁹ See footnote 11, appellants' original brief.

of acquiring permanent residence in this country, *but need not avail himself thereof.*³⁰ (Emphasis added)

and intervenor appellees allege that

"One can clearly be 'lawfully admitted for permanent residence' without being an actual resident in the United States."³¹

We can understand intervenors adopting this position, for they have nothing to lose by claiming that the privilege of residence need not be exercised — that the status is not lost by failure to reside in this country. But we are quite surprised that government appellees also adopt that position—even for purposes of this lawsuit—for it is inconsistent with the position taken by the government appellees in other proceedings and it runs counter to a long line of judicial and administrative decisions. As recently as February 15, 1961, the Attorney General, acting through his Board of Immigration Appeals, held in *Matter of B—*, 9 I. & N. Dec. 211, that B—, an alien, left his residence in the United States and abandoned his intent to return to that residence, therefore, he lost his status as an alien admitted for permanent residence. To the same effect, see *U. S. ex rel. Alther v. McCandless*, (C.A. 3) 46 F.2d 288; *Transatlantica Italiana v. Elting*, (C.A. 2), 66 F.2d 542; *United States ex rel. Lesto v. Day*, 21 F.(2d) 307 (C.A.2); *U.S. v. Parisi*, 24 F, Supp. 417; *Sercerchi v. Ward*, 27 F. Supp. 437; *Matter of D—C—*; 3 I. & N. Dec. 519; *Matter of F—A-6783639* and *A-6789803*, July 1, 1948 (C.O.) [Unreported, but see p. 20 appellants' original brief]; *Matter of T—*, 8 I. & N. Dec. 500, (Dec. 10, 1959).

Such cases establish positively that an alien admitted for permanent residence loses that status

³⁰ Government brief, p. 68.

³¹ Intervenor brief, p. 15.

unless he maintains and intends to maintain domicile in the United States. Congress made this rule statutory by adding the phrase "such status not having changed" to the definition of "lawfully admitted for permanent residence." Applying ordinary meaning to ordinary words, the definition means that aliens may have the privilege of residing permanently in the United States, and that privilege shall exist so long as it is not changed. How then can it be changed? *Transatlantica Italiana v. Elting* and similar cases tell us that it may be changed if the alien abandons his residence in the United States, or may be lost if, as in *Matter of D—C—*, the alien fails to take up residence in the United States.

But even if appellees' strained construction of the provision were correct, it would still provide no basis for the commuter practice. Appellees reason that §101(a)(20) confers a privilege—a privilege to reside in this country—and that privilege need not be exercised. If they are right, their analysis only indicates that an alien could attain such privilege—or "status" if one prefers the term—and that he could thereafter remain in foreign territory indefinitely before exercising the privilege. If that is so, it still does not confer a privilege to commute to employment without exercising the requirements of permanent residence.³² Of course, the construction which appellees place on the proviso has long since been rejected by government appellees themselves in administering the Act, for both *Matter of B—* and *Matter of T—* were decided under the 1952 Act.³³

³² The government concedes that "each reentry by an alien having the status of a lawfully admitted 'immigrant' is a new 'entry' within the meaning of the immigration law." *United States ex rel. Volpe v. Smith*, 289 U.S. 422 (1938). See also House Report, U. S. Cong. & Admin. News, 82d Cong. 2d Sess., pp. 1683-1684.

³³ In *Matter of T—*, the Board of Immigration Appeals in 1959 held that an alien who abandoned his residence in the United States and departed to his native country was not entitled to reentry as a returning resident alien.

The Court will note that appellees cite no authority for their position that the privilege of residing in the United States need not be exercised. At page 59 of their brief government appellees urge that the phrase "such status not having changed" refers to the fact that an alien "might become deportable." We readily concede that the "status" can be lost by deportation, but the status can also be lost, on attempted reentry,³⁴ by the alien's failure to meet any of the qualifications specified in §212(a) (except those specified as inapplicable to aliens admitted for permanent residence) and by the loss or abandonment of the status of permanent residence. As we pointed out in our original brief—but without evoking contradiction or explanation by appellees—among the ways in which the government deems "status" to be lost is for the commuter to be out of employment in the United States for more than six months.³⁵ In *Matter of M— D— S— & L— G— & W— D— C—*, 8 I. & N. Dec. 209, 212 (Dec. 12, 1958), the Board of Immigration Appeals actually equated employment with residence, holding that

"... an alien of the *immigrant commuter class* who has been out of employment in the United States for 6 months is, notwithstanding temporary entries in the meanwhile for other than employment purposes, *deemed to have abandoned his status of a permanent resident in the United States* The salient points to be considered in determining abandonment of commuter status are *intention* and *loss of employment*." (Emphasis added)

Thus, there is no question that "such status not having changed" means that the privilege can be lost if not used, but the privilege under the statute

³⁴ §101(a)(13) defines "entry" to mean "any coming of an alien to the United States" See also footnote 32, *supra*.

³⁵ See *Auerbach*, *Immigration Laws of the United States*, 2nd ed., 1961, p.68; also cases cited at page 21 of appellants' original brief.

is to reside in the United States, not merely to work in the United States without maintaining residential status. Such cases as *Matter of H— O—* and *Matter of M— D— S—, et al*, can be explained only in terms of an *ultra vires* exercise of legislative power by an administrative agency, power which was not authorized by Congress, either in the Immigration and Nationality Act of 1952 or in the Administrative Procedure Act. Even worse, the power was exercised privately by the Board of Immigration Appeals, without any of the safeguards of §4 of the Administrative Procedure Act having been followed.

Appellees have also ignored the rule of construction noted at pages 34-35 of our original brief, that §101(a)(20) and related sections are to be read in *pari materia* with §101(a)(15)(H). If appellees are correct in their position, there would be no need for §101(a)(15)(H), §214 and §212(a)(14), yet these were the very provisions which were designed by Congress to provide entry for aliens who came to this country solely for the purpose of engaging in labor. If §101(a)(20) allows entry by an alien without an intent to reside in the United States, but merely with an intent to work here, then the way will be open for any number of aliens to apply for resident alien status for the purpose of working in the United States, not alone in the border cities, but anywhere in the United States. It must follow that such aliens will be free to come and go without establishing residence, without bringing their families, and without any intention of ever residing anywhere in this country, and, of course, without regard to prevailing labor conditions. Obviously, if appellees prevail the way will be judicially open for an alien to enter the United States with the avowed purpose—no subterfuge being necessary—of engaging only in employment. Such a

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³⁴ §101(a)(13) defines "entry" to mean "any coming of an alien to the United States" See also footnote 32, *supra*.

³⁵ See *Auerbach*, *Immigration Laws of the United States*, 2nd ed., 1961, p.68; also cases cited at page 21 of appellants' original brief.

is to reside in the United States, not merely to work in the United States without maintaining residential status. Such cases as *Matter of H— O—* and *Matter of M— D— S—, et al*, can be explained only in terms of an *ultra vires* exercise of legislative power by an administrative agency, power which was not authorized by Congress, either in the Immigration and Nationality Act of 1952 or in the Administrative Procedure Act. Even worse, the power was exercised privately by the Board of Immigration Appeals, without any of the safeguards of §4 of the Administrative Procedure Act having been followed.

Appellees have also ignored the rule of construction noted at pages 34-35 of our original brief, that §101(a)(20) and related sections are to be read in *pari materia* with §101(a)(15)(H). If appellees are correct in their position, there would be no need for §101(a)(15)(H), §214 and §212(a)(14). yet these were the very provisions which were designed by Congress to provide entry for aliens who came to this country solely for the purpose of engaging in labor. If §101(a)(20) allows entry by an alien without an intent to reside in the United States, but merely with an intent to work here, then the way will be open for any number of aliens to apply for resident alien status for the purpose of working in the United States, not alone in the border cities, but anywhere in the United States. It must follow that such aliens will be free to come and go without establishing residence, without bringing their families, and without any intention of ever residing anywhere in this country, and, of course, without regard to prevailing labor conditions. Obviously, if appellees prevail the way will be judicially open for an alien to enter the United States with the avowed purpose—no subterfuge being necessary—of engaging only in employment. Such a

person would not be a resident of the United States, and, like the commuter, would be even immune to selective service. ³⁶ Why then did Congress write special sections into the Act to protect American labor? As Judge Youngdahl pointed out, to accept the government's view

"would be to permit administrative practice to make a shambles of a provision which, with section 101(a)(15)(H), was newly designed by the 1952 Act in order to assure strong safeguards for American labor." ³⁷

The Court herein may therefore follow what is perhaps the real teaching of the *Albro* decision. The Supreme Court there refused to apply a loose construction of the statutory word "business," holding that it did not include "ordinary work for hire," ³⁸ and thus applied the statute in accordance with one of the main purposes of the legislation: "to protect American labor against the influx of foreign labor." ³⁹ By the same reasoning, Congress in 1952 could not have intended §101(a)(20) to be loosely construed so as to nullify corresponding provisions of the Immigration and Nationality Act which were designed to protect American labor, §101(a)(15)(H), §214 and §212(a)(14).

F. *Amalgamated v. Rogers and Safeguards for American Labor*

Only two other items in appellees' briefs relating to the sufficiency of the complaint to state a cause of action require comment. First, the many pages which each devoted to an attempt to prove Judge Youngdahl wrong in *Amalgamated Meat Cutters v. Rogers*, 186 F.Supp. 114 (D.C. 1960). The Court

³⁶ *Matter of M— D— S— & L— G— & W— D— C—* supra, at p. 213.

³⁷ *Amalgamated Meat Cutters v. Rogers*, 186 F.Supp. 114 (D.D.C.)

³⁸ 229 U.S. 231, 243.

³⁹ *Ibid.*

will note that despite these recent protests of the decision, government appellees did not appeal the case. In an effort to explain such failure to appeal, both government and intervenors reach outside the record, but also misstate the facts. In footnote 31, the government brief states that no appeal was taken because "the number of affected alien commuters dwindled during the progress of the strike, thus, substantially mooting that litigation." And at page 19 of their brief, intervenors, with unsuspected omniscience, assert that the reason the government did not appeal was that "the number of commuters involved had dwindled and the question was for all practical purposes moot." These are not the facts, and the Immigration and Naturalization Service knows they are not the facts. The summary judgment proceeding before Judge Walsh was based on a stipulation, filed of record in the case, which showed 178 commuter aliens working as strike breakers at Peyton Packing plant on or about January 28, 1960, and when the district court decree was enforced approximately 200 commuting aliens were found working at the plant. The strike, however, was not settled until a year later. Appellants regret having to go outside the record to provide this information, but it is information also available in government files. There is one source of record, however, which shows not only that the Peyton strike continued long after the court decree, but also that the Immigration and Naturalization Service took the position that Judge Walsh's ruling "adopted Judge Youngdahl's opinion as part of his decision." We have reference to the *Matter of J— P—*, 9 I. & N. Dec. 591 (March 19, 1962), Board of Immigration Appeals' decision which involved a Peyton Packing Company commuter who had been excluded

pursuant to the district court's order in *Amalgamated v. Rogers*.⁴⁰

The reasoning which appellees advance in an attempt to prove Judge Youngdahl wrong is the same reasoning previously answered in this and our original brief. We shall not repeat the answers. Likewise, there is no need to dwell on the fine points of a certification under §212(a)(14), because such a certification is not directly involved in this case.

The other and final item relating to our cause of action which, we shall here note, is the curious manner in which intervenors have restated the *question presented*. They charge that we have

"sought to change the classification of commuters from a classification of 'immigrant' to one of 'non-immigrant.' "

A reading of the Complaint as well as our original brief shows such charge to be drawn from thin air. Present commuters will not have their status changed. They will either move to the United States or lose their status. Whether they acquire non-immigrant status will depend entirely on the filing of new applications under Sections 101(a)(15)(H) and 214 and the action thereon of the Attorney General. We seek only to require—what the statute

⁴⁰ *Matter of J—P—* also illustrates how a commuter can afford to live on substandard wages that would not support a worker living in the United States. J—P— was a commuting alien strike breaker who resided in Juarez. After enforcement of the decree, he had to choose between giving up his employment with Peyton or becoming a bona fide resident of the United States. We quote from the decision:

"Appellant testified that he and his wife moved to El Paso in order to remove themselves from the class of commuters, but, because the Peyton Packing Company was able to employ appellant only part time, his paycheck, after deductions, was not sufficient to permit him to live in El Paso, except under the poorest conditions. Therefore, they returned to Juarez."

This one case tells the whole story of what wage competition by commuters does to wages and conditions among thousands of workers living in the United States, who are forced either to accept jobs and wages which have been set by and for the alien commuter, or to face unemployment or the prospect of seeking jobs outside their home community. The 180 individual appellants herein are among this group of affected workers.

requires—that immigrants admitted for permanent residence reside in the United States or lose that status. We also seek to require the Attorney General to utilize the non-immigrant labor provisions of the Act as a source of alien labor which may enter under safeguards that will protect domestic wage and employment conditions. The commuter of the future will not be an immigrant—he will be an alien whose wage rate and employment opportunity will be appreciably regulated by the Attorney General and other governmental officials, especially the Secretary of Labor. This is the scheme originally programed under §§101(a)(15)(H), 214, and 212(a)(14) of the 1952 Act. Any changes beyond that must be accomplished by Congress or by the treaty-making power.

II. POSTURE OF THIS CASE ON MOTION TO DISMISS

It seems to be both appropriate and necessary to remind appellees that this case has not been tried on the merits. The Court below denied plaintiffs' motion for summary judgment, and did not act on defendants' cross motion for summary judgment. The Court did not treat defendants' motions to dismiss as motions for summary judgment or as "speaking" motions. The motions to dismiss, therefore, must stand or fall on the averments in plaintiffs' Complaint [J.A. 2-23]. Although appellees also filed nineteen statements of individual intervenor commuters, and a hearsay and opinion statement of the Honorable Dean Rusk, such statements can do no more than create issues of fact. Actually, none of those affidavits contested any of the material facts asserted in the Complaint. Indeed, the government admitted that

"Apart from the problem of appellants' injury and standing generally, Government appellees

agree there is here no issue as to any material fact." ⁴¹

Our approach to this reply brief is therefore consistent with that admission, for the only ripe issue is whether plaintiffs' Complaint stated a claim upon which relief can be granted. Since that is the only issue on which it is conceded that no factual dispute exists, the Court below in effect granted a demurrer.

The foregoing statement by the government recognizes an issue as to (1) appellants' injury and (2) appellants' standing to bring this action.

As to issue (1), *appellants' injury*, decision must rest on the allegations in the Complaint, for none of those allegations are contested by any affidavit or by any statement in the deposition. Appellees may not put the jurisdictional allegations in issue merely by a motion to dismiss challenging the jurisdictional allegations of the Complaint. Moore's Federal Practice, 2d ed, ¶ 12.14, p. 2267, suppl. p. 165; *Stern v. Beer*, 200 F.2d 794 (C.A. 2, 1952), 17 F.R. Serv. 15a, 241, case 1.

The Complaint alleges in part as follows (emphasis added):

"16. As to literally thousands of commuting aliens, (the exact number being unknown to the plaintiffs but it is estimated to exceed fifty thousand persons) defendants have failed and refused to enforce the provisions of the Immigration and Nationality Act of 1952, especially those provisions cited herein above.

"17. *Defendants have largely ignored the provisions of Title 8 U.S.C. §§ 1101(a)(15) (H) and 1184 as a source of alien labor which can be made available without displacing the*

⁴¹ Government brief, p. 11.

employment of workers in the United States. Instead, defendants have knowingly permitted the use of permanent resident alien status by commuting aliens who are residents of contiguous foreign territory. By this "amiable fiction," I-151 border crossing identification cards, which are designed solely for issuance to bona fide residents of the United States with a current status of permanent resident alien, are used as a device to permit daily commutation entry of residents of a foreign country for the sole purpose of engaging in employment in the United States. Such use violates the Act, and is in derogation of the letter and intent of said Act regarding use of the express provisions referred to herein above, and also Title 8 U.S.C. §1182(a) (14), for entry of aliens to engage in employment under conditions which will safeguard domestic labor.

"18. As a result of *defendants' action and inaction* referred to in paragraphs 16 and 17 above, the entire economy along the Mexican-United States border has severely suffered. Especially in the Texas counties bordering the Rio Grande River, *serious unemployment, low wages and forced migration of United States residents have been proximately caused by the vast influx of aliens who commute daily from their residences in Mexico to jobs in Texas.* Such commuters have wrongfully and illegally been granted and allowed to maintain the status of 'permanent resident alien' by the defendants. These commuters, whose ranks are increased by thousands each year, provide a virtually inexhaustible supply of cheap labor which, because it comes into this country under 'immigration' provisions rather than under 'labor' provisions of the statute, comes in without any limitation and subject to no safeguards. These commuters work in all types of jobs, especially in jobs which are not subject to the bare mini-

mum wages and protections of the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* For example, many work for as little as \$2.50 per day as maids or \$3.75 per day as laundry workers, and many commute to construction jobs in the United States where they are paid substantially below the prevailing rates paid to domestic workers, who are available to perform such work but for the presence of commuting aliens who are able and willing to work for wages which are less than living wages to workers residing in the United States where the standard and cost of living is substantially higher than that which exists on the opposite side of the border where the commuters reside.

"In recent years especially, the normal depressing effect of this influx of commuters upon wage rates has also been felt upon job opportunities. *As a result of the thousands of daily commuters engaging in employment on the United States side of the border, thousands of bona fide United States residents, capable of performing such work, have been forced into unemployment. Thousands of others have been forced into annual migrations to seek employment in distant parts of the United States.*

"19. *The individual plaintiffs herein are among these bona fide United States residents who have been directly damaged as a result of defendants' action and inaction, set out herein above, of permitting commuting aliens to enter the United States for purposes of employment without regard to the provisions of the Act which provide safeguards for American workers. Each of said individual plaintiffs has been unemployed for various periods during the years 1960 and 1961, at a time when commuting aliens with I-151 border crossing identification cards were working at jobs in the United States which plaintiffs were capable of performing. Said plaintiffs are typical and rep-*

representative of tens of thousands of persons similarly situated along the Rio Grande River who have been unemployed while commuting aliens were working at jobs which residents were capable of performing. These persons are too numerous to be brought before the Court as parties to this action, but they comprise a class which will be fairly represented by the plaintiffs herein.

"20. Many of the members of organized labor represented by plaintiff Texas State AFL-CIO and its component labor unions likewise have suffered and are suffering unemployment because commuting aliens are employed in jobs which these members are capable of performing. In addition, their wage rates have remained low because of the competition with the substandard wages paid to commuting aliens.

"21. Plaintiff Texas State AFL-CIO and its component labor unions have also suffered as a result of defendants' action and inaction regarding commuting aliens, because such aliens have provided employers with a virtually endless supply of employees who are willing to work for low wages and, because of their precarious status as 'immigrants' and their residence in a foreign country, are almost guaranteed to be non-union. Such commuters also prevent or discourage American labor organizations from engaging in legitimate strike activity to improve wages and working conditions because commuting aliens have provided an ever ready source of strike breakers available to work despite strike conditions." [J.A. 17-21]

Appellees have not put the above facts in issue, for had they done so appellants would have introduced competent and sworn evidence showing, *inter alia*, actual names, times, places and circumstances where individual appellants were unemployed though they were available for and capable of

mum wages and protections of the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* For example, many work for as little as \$2.50 per day as maids or \$3.75 per day as laundry workers, and many commute to construction jobs in the United States where they are paid substantially below the prevailing rates paid to domestic workers who are available to perform such work but for the presence of commuting aliens who are able and willing to work for wages which are less than living wages to workers residing in the United States where the standard and cost of living is substantially higher than that which exists on the opposite side of the border where the commuters reside.

"In recent years especially, the normal depressing effect of this influx of commuters upon wage rates has also been felt upon job opportunities. As a result of the thousands of daily commuters engaging in employment on the United States side of the border, thousands of bona fide United States residents, capable of performing such work, have been forced into unemployment. Thousands of others have been forced into annual migrations to seek employment in distant parts of the United States.

"19. The individual plaintiffs herein are among these bona fide United States residents who have been directly damaged as a result of defendants' action and inaction, set out herein above, of permitting commuting aliens to enter the United States for purposes of employment without regard to the provisions of the Act which provide safeguards for American workers. Each of said individual plaintiffs has been unemployed for various periods during the years 1960 and 1961, at a time when commuting aliens with I-151 border crossing identification cards were working at jobs in the United States which plaintiffs were capable of performing. Said plaintiffs are typical and rep-

representative of tens of thousands of persons similarly situated along the Rio Grande River who have been unemployed while commuting aliens were working at jobs which residents were capable of performing. These persons are too numerous to be brought before the Court as parties to this action, but they comprise a class which will be fairly represented by the plaintiffs herein.

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"21. Plaintiff Texas State AFL-CIO and its component labor unions have also suffered as a result of defendants' action and inaction regarding commuting aliens, because such aliens have provided employers with a virtually endless supply of employees who are willing to work for low wages and, because of their precarious status as 'immigrants' and their residence in a foreign country, are almost guaranteed to be non-union. Such commuters also prevent or discourage American labor organizations from engaging in legitimate strike activity to improve wages and working conditions because commuting aliens have provided an ever ready source of strike breakers available to work despite strike conditions." [J.A. 17-21]

Appellees have not put the above facts in issue, for had they done so appellants would have introduced competent and sworn evidence showing, *inter alia*, actual names, times, places and circumstances where individual appellants were unemployed though they were available for and capable of

performing specific jobs held by alien commuters. In footnote 6 the government complains about insufficient specificity as to appellants' damages. It is a matter of elementary pleading and practice that such objection is both unfounded and untimely. Appellees made no effort to file a motion to strike, a motion for a more definite statement or to utilize any of the discovery procedures available under the rules. ⁴²

As to issue (2) *appellants' standing to bring this action*, we submit that the government's admission that factual issues exist on this point preclude dismissal at this stage of the proceeding. Appellees introduced no evidence which would vary the allegations in the Complaint bearing on standing. As we have noted in our original brief, and note again below, the Complaint is sufficient to support appellants' standing to bring this action.

Statements on page 5 of the government brief illustrate the incompleteness of the record on the matter raised by appellees and also their tendency to reach outside the record to argue an issue of fact. The government asserts—erroneously—that some of the intervenors are members of unions affiliated with appellant Texas State AFL-CIO. In footnote 10 it refers to membership in "Amalgamated Textile Workers of America"—a union which does not exist (Directory of National and International Labor Unions in the United States, 1961, Bulletin No. 1320, Mar. 1962, U. S. Dept. of Labor, B.L.S.). And if the alleged membership of two commuters in the Amalgamated Clothing Workers of America were material and an issue, the facts would show that about

⁴² The government again goes outside the record in the second paragraph of p. 32 and in footnote 42 of its brief. There is no record basis for its contention that appellants' injury "is produced by the competition for jobs which occurs apart from and after the alien commuters' entry as immigrants has been affected." In any event, this would raise a fact issue to be resolved in the ordinary manner.

a year ago that union lost a decertification election at the plant in question, so that today the Amalgamated Clothing Workers of America does not have a single member in El Paso, a direct result of the impossibility of organizing and holding shops which employ substantial numbers of commuters. Thus, the true facts as to intervenors Francisco Garcia and Lucia Parra-Vasquez would show just the opposite of what the government intends. If this is material, then, of course, appellants are entitled to have their day in court and have the matter determined by trial.

Likewise, there is nothing in the record about a commuter practice along the Canadian border. Appellees have gone to great pains to allege such a practice, but there are no facts of record on the subject. We have an indication, however, (from the government's recent report filed with Congress, referred to in footnote 42 of government's brief) that the problem exists primarily on the Mexican border. The Report stated:

"There are no very precise estimates of the numbers of commuter aliens. The largest number reside in Mexico, and it is commuting from that nation that has aroused the most public interest and concern. The scattered and fragmentary information that is available certainly indicates that the commuter-alien situation on the Canadian border is much less important."⁴³

III. THE "POLITICAL" AND "FOREIGN RELATIONS" QUESTION

Appellees ask this Court to sustain the dismissal because a "political" question is presented and because, in the opinion of the Secretary of State, "a judgment on the merits in this case would be unde-

⁴³ H. Comm. on Judiciary, Subcomm. No. 1, Study of Population and Immigration Problems (III) (1963). pp. 155-156.

sirable from the standpoint of the foreign relations of the United States." None of these objections relate to jurisdiction or to the question of whether the Complaint states a sufficient claim. At best, appellees' contentions would be considered after trial on the merits and in connection with the fashioning of a remedy, if any.

The trial court never ruled on the admissibility of the hearsay and conclusionary statement of the Secretary of State. Our original brief noted the objections as to hearsay, immateriality, and conclusions, but these objections were ignored by the government (see government's brief, footnote 17). The government ostensibly filed the affidavit because foreign relations were mentioned in paragraph 22 of the Complaint, however, those allegations in the Complaint were not deemed material for they were not relied on in appellants' motion for summary judgment. ⁴⁴ Appellants filed their objection to the affidavit in writing and also by oral presentation in open court, but the trial judge failed to rule either on the objections or on the affidavit. Had the court ruled in favor of the admissibility of the affidavit, then it would have been incumbent on the court to grant "reasonable opportunity to present all material made pertinent" in accordance with Rule 12(b), Federal Rules of Civil Procedure. Certainly appellees have no reason to "infer" that "appellants are really unable to meet the force of the Secretary of State's affidavit," (Footnote 17) for there is no duty to meet hearsay and conclusions supported by hearsay. ^{44A} The judiciary should certainly not abdicate its judicial function whenever an executive officer, like the boy crying "wolf," cries "politics" or "foreign affairs."

⁴⁴ See *Plaintiffs' Statement of Material Facts Supporting Motion for Summary Judgment* [J.A. 67-79], which was filed three weeks before the filing of the Dean Rusk Affidavit.

^{44A} See footnote 46 *infra*.

If that is really an issue—which we submit it is not in this case—then it should be determined on competent proof like any other issue. The government is not a privileged litigant and the rules of evidence still apply.

The government does concede that this argument is not based on lack of jurisdiction, for it was not included among its grounds for dismissal for want of jurisdiction [J.A. 81 and government brief, p. 81]. The argument in its motion was prefaced with the phrase:

“In any event, even assuming *arguendo* there is jurisdiction, the Court should, in the exercise of a sound judicial discretion, abstain from entertaining jurisdiction in equity or mandamus proceedings here”

Unfortunately for appellees, there is no basis under Rule 12, or elsewhere, for a dismissal on grounds of politics or foreign policy—where there is jurisdiction—at least not at this stage in the proceeding. The three cases cited by the government ⁴⁵ are inapposite. In each there was a development of the facts in the ordinary manner. ⁴⁶

⁴⁵ *Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304; *Jones v. United States*, 137 U.S. 202.

⁴⁶ To illustrate that the view expressed by Dean Rusk, in which he purports to be predicting the attitude of the Mexican government is by no means shared by many persons who are in a position to know the facts, we append to this brief two newspaper articles. They are entitled to be given as much competence as the governments' hearsay affidavit, although we append them not as evidence of record, but rather as economic data or data which shows the type of contradictory evidence that would be available if this issue were being determined after competent testimony and opportunity for cross-examination.

Appendix A quotes the head of the Mexican Confederation of Labor and National Senator, Fidel Velasquez, as “sympathizing” with the problem of the Texas State AFL-CIO, noting that commuter labor “hurts native labor,” and that the Mexican dollar earner, in part, is responsible for price inflation in Nuevo Laredo. He further stated, regarding a check on commuters, that “only an arbitrary, baseless agreement might create a state of distrust” between the two countries.

Appendix B quotes a United States consulate official on the border to the effect that Mexican commuters earn from \$10 to \$12 a week and in some instances as little as \$5 a week. The official also said Laredo employees cannot afford to work for \$10 a week, that there were an estimated 10,000 unemployed workers in Laredo and that a good many of them would be working if commuter labor was not being used.

Although it is perhaps unnecessary in the present state of the record, nevertheless, we shall briefly note why the action sought herein should not be withheld on grounds of "foreign relations" or "political effect," and that this case is wholly distinguishable from the three cases on which the government relies.

(1) The case does not involve exercise of agency discretion.

(2) Congress did not delegate the interpretation or application of the immigration statute to the President or to the Secretary of State, but rather to the Attorney General as an administrator.

(3) The action complained of here was not made by the Secretary of State or by the President. Dean Rusk has not acted herein, he has only given his opinion as to action taken by the administrator of the immigration act.⁴⁷

(4) It is recognized that there are areas in the administration of the immigration law where the Attorney General may exercise discretion, and Congress wrote several such provisions into the Act. No such discretion is involved herein. If good foreign relations would require continuation of the commuter program, that argument should be addressed to Congress rather than to the Court.

(5) Merely labeling an action as *political* or as *affecting foreign affairs* leads to an absurd result.

⁴⁷ We ask the Court to strike from the government's brief the unwarranted and factually inaccurate footnote 15, which not only reaches outside the record but also cites—incorrectly—conversations relating to settlement of the lawsuit. Appellants repeat, however, that there is no competent evidence in this record relating to negotiations with Mexico on the problem. We assure the Court, however, that such negotiations are most welcome, and appellants feel that their views should be considered if and when such negotiations are held. But we also feel that the United States should conduct its negotiations with dignity, based upon a realistic view of what the present law allows and what it does not allow. The Acts of Congress are still to be treated as part of the supreme law of the land, and the interpretation of those Acts is the function of the judiciary, not the executive branch.

The problem here is no different than the hypothetical case in which the Secretary of State or the Attorney General decides that an immigration quota should be changed, waived or closed as to a particular nation because of its sensitive effect on foreign affairs. Obviously, the administrator of the Act would have no discretion to vary the terms of the Act, regardless of the effect, and if he did so a mandamus would be a proper remedy. Another illustration would be a refusal of the Attorney General to enforce a certification under §212(a)(14).⁴⁸ Of course, all of these questions—like everything involving a law of Congress—are political, and many of them might affect our foreign relations. But unless the Court finds that the authority to interpret §101(a)(20) and §101(a)(27)(B), *inter alia*, and to determine the requisites for immigrant status, regardless of the wording of the statute, was delegated to executive discretion by Congress, appellees have raised no valid defense. The three cited cases all involved a similar finding by the Court.

IV. THE DISTRICT COURT HAD JURISDICTION OVER THE SUBJECT MATTER

A. Appellants had Standing to Sue

Appellees never come to grips with the fundamental basis for appellants' standing. They write of "competition" and "economic injury" in a general way, but they never respond to the most basic question posed by the Complaint: appellants have a statutory right to be free of job competition by aliens unless "unemployed persons capable of performing such service or labor cannot be found in this country." [§101(a)(15)(H)] Individual appellants allege they have been unemployed when commuting aliens have been working in this country

⁴⁸ Cf. *Amalgamated Meat Cutters v. Rogers*, *supra*.

at jobs which appellants are capable of performing.

Appellees, wholly indifferent to those allegations, argue that "It is not enough to assert an alleged injury to a right the complainant shares in common with the public generally. . . It is equally well settled that no one has a common-law or constitutional legal right to be free of economic injury from competition."^{48A} We are not talking about rights shared with the public generally, nor are we talking about common law rights; we are talking about rights conferred by statutes. The cases cited by appellees are distinguishable on their facts, but the list of cases is incomplete and appellees conclusions as to the law of standing are in error.

The following excerpt from *Davis, Administrative Law Treatise*, Vol. 3, pp. 211-213 (§22.02) accurately summarizes the law:

"The reasons in favor of permitting a challenge of governmental action by one who is in fact adversely affected by that action are very powerful. The strongest reason is the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy. The second reason is that the artificiality and complexity of the law of standing would disappear if the courts would follow the simple idea that one who is in fact hurt may challenge; the large amount of litigation over the unnecessary complexities of the law of standing is wasteful. The third reason, applicable in the federal system, lies in the intent behind the Administrative Procedure Act.

"The APA provides in section 10: 'Except so far as (1) statutes preclude review or (2) agency action is by law committed to agency discretion—(a) Right of Review. —Any person suffering legal wrong because of any agency

^{48A} Government's brief, p. 17.

action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.'

"Although the legislative history is not entirely free from conflicting views, the part of the legislative history that is both clear and authoritative is the statement made by the committees of both the Senate and the House, identical in both reports: "This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute.'

* * *

"The solid part of the legislative history is thus the statement of the Senate and House committees that one who is 'adversely affected in fact' may challenge administrative action.

"The conclusion thus seems to be abundantly supported that one who is in fact adversely affected may obtain judicial review, in absence of adequate affirmative reasons for denying standing."

See *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L.Ed.2d 584 (1963); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S. Ct. 275, 7 L.Ed.2d 285 (1961); *City of Chicago v. Santa Fe R. Co.*, 357 U.S. 77, 78 S. Ct. 1063, 2 L.Ed.2d 1174 (1958); *Allied Stores v. Bowers*, 358 U.S. 522, 79 S. Ct. 437, 3 L.Ed.2d 480 (1959); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 84 L.Ed. 869 (1940); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 62 S. Ct. 875, 86 L.Ed. 1229 (1942); *FCC v. NBC (KOA)*, 319 U.S. 239, 63 S. Ct. 1035, 87 L.Ed. 1374 (1943); also cases cited in our original brief, pp. 39-41.

The seven cases cited at page 36 of our brief as

to the authority of the Texas State AFL-CIO to bring this action have not been distinguished, nor have appellees addressed themselves to the justiciable interest of this labor union as alleged—without contradiction in this record—in paragraphs 20 and 21 of the Complaint. ⁴⁹

See also this Court's decision in *National Coal Ass'n. v. Federal Power Commission*, 89 U.S. App. D.C. 135, 191 F.2d 462 (1951), which recognized the standing of the U.M.W., a labor union representing coal miners, and the Railway Labor Executives Association, whose members were employed by railroads which competed with pipe lines as fuel carriers, to bring an action with others challenging the granting of a certificate by the F.P.C. for the construction of a pipeline.

B. A Case or Controversy is Presented

None of government appellees' cited cases (p. 34) are in point. See Part I of this brief and our original brief. No advisory opinion is sought, for appellants' pray for specific relief. The Secretary of State recognized this when he expressed alarm at the possibility of a "sudden termination of the commuter system as a result of a court decision. . . ." [J.A. 83]. Of course, whether the termination is sudden or not will depend on the kind of remedy the court of equity fashions. ⁵⁰

See *Evers v. Dwyer*, 358 U.S. 202, 3 L.Ed.2d 222, 79 S. Ct. 178, on the requisites of an actual case or controversy.

⁴⁹ Supra. p. 27.

⁵⁰ For example, in the celebrated case of *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 349 U.S. 294, 75 S.Ct. 753, the Supreme Court fashioned a remedy in equity which did not provide for a sudden termination of the unlawful practice. As the second opinion pointed out, "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and reconciling public and private needs." 349 U.S. 300.

**C. The Determination Herein
is Not Judicially Nonreviewable**

The government, with admirable candor, bases its contention on a claim that *nobody* has a right to bring an action to construe the Immigration and Nationality Act. The government's statement (brief, pp. 22-23) is so at variance with a long line of judicial opinion that we reproduce it here for emphasis:

"Third, we maintain, consideration of the Immigration and Nationality Act in entire context, and in light of the whole statutory scheme, purpose and history of the immigration law, makes it clear that the Congress did not mean to confer by any of the provisions therein a personal legal right enforceable in the courts, or any right to sue as a party 'adversely affected' or 'aggrieved', upon any segment of the populace to contest immigration actions taken in the case of any particular alien or aliens."

We shall not burden the Court with a list of the decisions which refute that statement. But see the numerous cases cited in §28.10 of *Davis, Administrative Law Treatise*, p. 47 *et seq.*, which are prefaced by this comment:

"The alien cases have significance for other fields of administrative action because they so neatly demonstrate the extent of judicial independence of statutory provisions concerning reviewability."

See Rusk v. Cort, 369 U.S. 367, 82 S. Ct. 787, 7 L.Ed.2d 809 (1962); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S. Ct. 591, 99 L.Ed. 868 (1955); *Rubinstein v. Brownell*, 92 U.S. App. D.C. 328, 206 F.2d 449 (1959), *aff'd* by equally divided ct., 346 U.S. 929, 74 S. Ct. 319, 98 L.Ed. 421 (1954); *Brownell v. Tom We Shung*, 352 U.S. 180, 77 S. Ct. 252, 1 L.Ed.

2d 225 (1956). Cf. *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L.Ed.2d 210 (1958).

Even if Congress had so intended—which in this instance it clearly did not—it is unlikely that a statute could be made judicially nonreviewable as to the construction of its terms. As the Supreme Court wrote in 1841 in *United States v. Dickson*, 15 Pet. 162, 10 L.Ed. 689, in a case which reversed an administrative interpretation of the statute,

“But it is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.”

Conclusion

Appellants respectfully pray that the judgment below be reversed with instructions that judgment on the undisputed facts be entered, granting appellants the relief which they seek.

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December 8, 1963.

APPENDIX A

THE SOUTH TEXAS CITIZEN

LAREDO, TEXAS THURSDAY, JULY 19, 1962

COMMUTER PROBLEM AIRED

Laredo Labor Leaders Confer With CTM Chief

National Mexican Senator Fidel Velasquez, chief of the powerful Confederacion de Trabajadores Mexicanos (C.T.M.), told Laredo labor leaders Wednesday that he sympathizes with their program to halt Mexican commuter workers along the United States-Mexico border, particularly in South Texas.

Senator Velasquez, on an official visit with C. T. M. leaders in Nuevo Laredo, crossed into Laredo early Wednesday evening to confer with members of the city-county Central Labor Council.

"I am well aware of the problem," Senator Velasquez told the group about Mexican citizens who daily cross at border towns to work on U. S. jobs. "The problems of the braceros and the frontier workers have been brought to our organization before."

The senator told Jose H. Vasquez, president of the Central Labor Council, "I sympathize with your problem."

Vasquez and Martiniano Bazan, council secretary, greeted Senator Velasquez in the lobby of the Plaza Hotel as official representatives of Hank Brown, president of the state AFL-CIO.

Brown named Vasquez and Bazan as his spokesman at the AFL-CIO convention in San Antonio this week.

Accompanying the Mexican labor leader to Nuevo Laredo are Juan Diaz Macias, relations secretary for the national C.T.M. committee, and Jose Maria Cruz, secretary for the national C.T.M. Cruz also is secretary-general of the Longshoremen's Union, a key affiliate of the C.T.M.

(Continued on Page 6)

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APPENDIX A

Laredo Labor . . .

(Continued from Page 1)

Senator Velasquez was unanimously re-elected head of C. T.M. in April at a convention attended by 15,000 delegates representing 1,800,000 affiliates from throughout the Republic of Mexico.

Velasquez, who represents the Federal District, and his aides were greeted in Nuevo Laredo by Professor Pedro Perez Ibarra, C. T. M. chief in the Sister City. The professor and other Nuevo Laredo labor groups, including the Central Labor Council, honored Senator Velasquez at a testimonial dinner Wednesday night at La Roca in Nuevo Laredo.

The senator was presented with a commendation medal in recognition of the love and respect the working people of Nuevo Laredo have for the man.

Vasquez, Bazan, and Attorneys V. G. Roel and Librado Penn conferred with Senator Velasquez at length on the Mexican commuter situation.

They gave the senator figures on a survey conducted by the U. S. Department of Labor with emphasis on conditions in Laredo, El Paso, and Brownsville, as well as figures on labor migration from South Texas.

A report from the Texas Council on Migrant Labor, Vasquez told the senator, showed 32,000 workers migrate from the Rio Grande Valley alone and 12,000 from Webb County. The report does not include non-working members of families.

They also presented Senator Velasquez an official report on distribution of USDA commodities in Webb County. For the week ending May 21, some 13,073 persons received surplus commodities, according to Ricardo Garcia, director of the Central Welfare Agency.

"The problems of the worker knows no borders," Senator Velasquez told the group. "We are well aware of the situation here."

He said the C.T.M. has always opposed "workers being used as squirrels by commerce." Senator Velasquez said he realized how commuter labor "hurts native labor."

Referring to the U. S. Department of Labor study, Vasquez advised the C.T.M. head that salaries in some businesses along the border range from \$9 to \$15 per week. Vasquez also cited one case in which a man was worked 96 hours and drew \$20 for the week.

The senator said his organization has always fought "commerce exploitation of workers."

"There's a pact, a compromise, between our governments to deal with this problem," he said. "I think, too, there's been negligence on both sides. We must give public light to the situation and clear all this misunderstanding."

He agreed also that commuters are non-union labor which cannot be controlled.

The senator also concurred with Laredo labor leaders that the Mexican dollar earner, in part, is responsible for price inflation in Nuevo Laredo and as such is harming the peso earners in the Sister City.

They agreed that Mexican border town prices are geared to the dollar, millions of which go across yearly to affect the economy on both sides.

Senator Velasquez suggested labor groups from both sides join to draw formal presentations to their respective governments "to put an end to all this exploitation. The solution should be arrived at by both sides."

"Absolutely we are an enemy of labor exploitation in any country of the world," the senator declared.

He said that if existing laws were not adequate to handle the problem, then new ones should be enacted.

Senator Velasquez did say that a check on Nuevo Laredo commuters might affect U. S.-Mexico relations, adding, however, that "only an arbitrary, baseless agreement might create a state of distrust."

Vasquez also told the senator that the state AFL-CIO is awaiting the outcome of a suit against the U. S. Attorney General and the Department of Justice demanding that the immigration laws relative to commuters be enforced.

APPENDIX B

CORPUS CHRISTI CALLER
Corpus Christi, Texas—
January 12, 1963

Employee Pay Hike Is Sought

NUEVO LAREDO (Sp) — A U.S. consulate official said Friday that local employees should be given substantial pay raises to increase their standards of living.

Ben Zweig, U.S. consul here, made the comment during an informal conference with local businessmen. According to the officials, employees earn about 10 pesos a day (about 80 cents.) Zweig said that is not enough to strengthen the town's buying power.

Raising salaries would increase their standards of living, Zweig said.

He further noted that Mexicans who commute daily to jobs on the Laredo side of the river earn from \$10 to \$12 a week and in some instances they are paid as little as \$5 a week.

The officials said this represented unfair competition to the Laredo employees as well as to Nuevo Laredo workers. He said the Laredo employee cannot afford to work for \$10 a week and the Nuevo Laredo employee is hampered because he earns 10 pesos a day and retail prices generally are based on the American dollar.

Zweig estimated that there are about 10,000 unemployed workers in Laredo and that a good many of them would be working if commuter labor was not being used, especially in the downtown retail stores.

APPELLANTS' REPLY TO
GOVERNMENT'S POST-HEARING BRIEF

In the
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,976

TEXAS STATE AFL-CIO, ANTONIO AGUILAR,
JULIA AMAYA, et al,

Appellants,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, AND
RAYMOND F. FARRELL, COMMISSIONER OF
IMMIGRATION AND NATURALIZATION,
Government Appellees,

and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES
(LEYVA), CONCEPCION AURORA CAGIGAS FRAIJO, et al,
Intervenor Appellees.

On Appeal From Judgment of District Court of District
of Columbia Dismissing Action

United States Court of Appeals
for the District of Columbia Circuit

J. ALBERT WOLL,
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In the
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On Appeal From Judgment of District Court of District
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**APPELLANTS' REPLY TO
GOVERNMENT'S POST-HEARING BRIEF**

Appellants file this their reply to government appellees' post-hearing supplemental brief, pursuant to leave of Court granted during oral argument.

**I. Section 101(2)(32) of the Immigration and
Nationality Act Precludes Entry of
Alien Commuters as Nonquota Immigrants.**

Government appellees made their first effort at explaining the restrictions of §101(a) (32) in their posthearing supplemental brief. But they present

no meaningful rebuttal. At page 2 of their reply they recognize that the "alien commuters . . . cannot be admitted or considered in any manner to be within the 'non-immigrant category . . .,' " but they fail to note that the same sentence in the statute—with the same forcefulness—also provides that the alien commuter cannot be admitted or considered in any manner to be a *nonquota immigrant*. The six pages of rebuttal ignore that very point, which is the core of the matter.

The reply also insists "that alien commuters have never been regarded to be within any 'non-statutory category of immigrants'—either under the 1924 Act or under the Immigration and Nationality Act." Yet, in *Matter of M—D—S—, et al*, 81. & N. Dec. 209 (1958), the Board of Immigration Appeals held that the commuter status was "artificial" and that the "The commuter situation *manifestly* does not fit into any precise category found in the immigration statutes." (Emphasis added) If the Government thought the Board of Immigration Appeals to be wrong, or that it had simply used an unfortunate choice of language, government appellees would certainly have told us so by now. But *The Matter of M—D—S—* was right in its major premise: the alien commuter category is manifestly not based on statute. It therefore follows that a commuter is not "entitled to readmission as a returning resident" because the commuter has no lawful residence in the United States to which he is returning. The government's single reference to the *M—D—S—* case, at page 5 of the reply brief, emphasizes the strained construction which it places on the Act: a commuter may be readmitted as a returning *resident* only if he maintains his status [such status not having changed] of a *commuter*. At least the decision in the *M—D—S—* case was predicated on an

honest if not a legal premise. The Board did not try to base its decision on the statute, but frankly relied on an artificial status which it justified by its concept of "good international relations." The Board was in error, however, because Congress did not delegate to the Attorney General such authority to create a non-statutory category of immigrant, regardless of his view of international relations.

The government argues that if the commuters are not non-immigrants under §101(a)(15), then they must be immigrants. That does not follow at all. They are simply *illegal aliens*, like any other aliens in the United States who lack legal status as immigrants or nonimmigrants.

It will also be noted that neither in oral argument nor in the reply brief did appellees answer the problem posed by §101(a)(27)(B), which confers *nonquota immigrant* status on a resident returning from a *temporary visit abroad*. Even if resident alien status is only a privilege which one need not exercise, how does the alien commute back and forth if he is not returning to his *residence* in the United States from a *temporary visit* in a foreign country? It can be done only if the "amiable fiction" is adopted, that his employment is his residence, but this is now rendered impossible by the precise definition of residence in §101(a)(33) and the limitation on nonquota immigrants to those "particularly specified in the Act" in §101(a)(32).

II. Reply to Part II of Supplemental Brief

The government seeks to explain the reference to "economic conditions" in Senate Report 1515, p. 474, as referring to "economic depression." The text, however, plainly refers to "economic conditions" as among various "qualitative restrictions *in the law*," (emphasis added) and the phrase obviously does

not refer to external economic conditions, such as "depressions." Examination of the preceding text on pages 472 and 473 adds further support to the conclusion that Congress was alarmed at certain aspects of the nonquota immigration from Western Hemisphere countries, but recommended that regulation be by *qualitative restrictions*. Everything which the Act did to circumscribe practices "with definite statutory limitations" to eliminate "inequities, gaps, loopholes, and lax practices," and to change the nonquota classification as a "modification of existing law," etc.,¹ represented such a qualitative restriction. Note these additional pertinent excerpts from the text of Senate Report 1515:

"The numerically unrestricted immigration from Western Hemisphere countries is a serious problem in view of the general policy of numerical restriction under the quota system." (p. 472)

* * *

"Many factors, such as the economic depression, intensive consular examinations, the requirement of visas and visa fees have had some deterring influence on immigration from nonquota countries. Since the decline during the depression years, there has been a gradual increase in immigration from the nonquota countries, reaching a total of 41,782 for the fiscal year 1948. Although this does not present as serious a problem as the peak of 146,729 in 1927, it still indicates that this numerically unregulated immigration presents one of the most questionable features of our immigration system."²

The government's post-hearing brief also comments on the relative authority of the 1950 Senate

¹ See pp. 30-32 of appellants' original brief and pp. 3-10, and 11-12 of appellants' reply brief.

² This contains the only reference to economic depression in the passage, a reference quite at variance with the conclusion the government draws at page 8 of its supplemental brief.

Report 1515 and the reports issued contemporaneously with passage of the 1952 Act. We of course recognize substantial authority for the 1950 Report, even though it was prepared for an earlier and different Congress, but such authority has its necessary limitations, for the draft bill was substantially changed and contemporaneous legislative reports were prepared to accurately advise of Congressional intent on passage of the new Act. The 1950 report, it must be remembered, was primarily a research document rather than an explanation of specific provisions in prospective legislation. The government fails to comment on the changes made in the final version of the Act, including those specifically mentioned in our reply brief, pp. 6-8.

The government's quotation from the 1952 Report only proves what the appellants readily concede, that in some areas, though not necessarily those involved herein, the 1952 Senate Report is both authoritative and comprehensive. One of those quotations,³ from House Report accompanying H.R. 5678, H. Rep. No. 1365, 82d Cong. 2d Sess. p. 28, stated that "certain parts of that document [Senate Report 1515] are being incorporated in the instant report." Significantly, none of the parts referring to the commuter practice were incorporated in the House Report. The House Report remains the more reliable source of legislative history.

Respectfully submitted,

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³ Page 9 of government's supplemental brief.

BRIEF FOR GOVERNMENT APPELLEES 1963

United States Court of Appeals

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APPELLEES

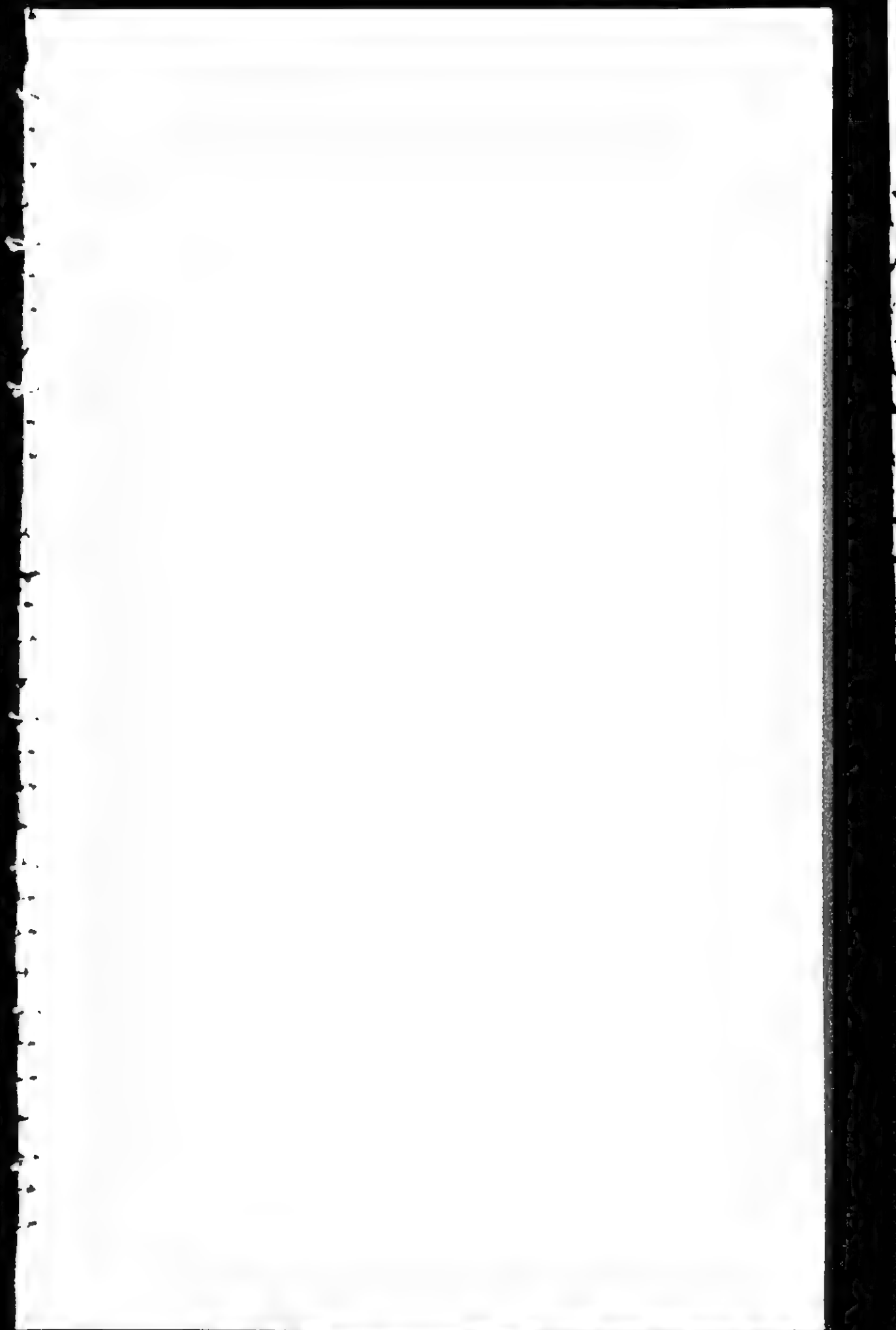
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Appellants are a labor organization, composed of labor unions operating in Texas, and individuals in five Texas border counties. Government appellees are the Administrators of the immigration laws. Intervenor appellees are individual "alien commuters" who have been working steadily in the United States—some since the 1920's—under recognized "immigrant" status, commuting regularly between their abodes in adjacent Mexico and their places of work in the United States. The Administrators have for more than thirty-five years recognized such "alien commuters" as enjoying "immigrant" status in the United States, so long as their "commuter" status is not interrupted. "Immigrant" aliens—including the "alien commuters"—lawfully compete economically with other workers in the United States for jobs.

Appellants here do not complain of any governmental action taken with respect to them personally. Rather, they complain of alleged governmental inaction with respect to "alien commuters" generally. They seek a court opinion in the abstract, declaring broadly what shall be the law governing the entire long-established "alien commuter" border practice along both the Canadian or Mexican borders, irrespective whether or not the "alien commuters" involved happen to be in economic competition with them for jobs.

The Secretary of State, the Honorable Dean Rusk, has certified that in his judgment this litigation involves sensitive foreign affairs considerations, including our continued "good neighbor" relations with Mexico and Canada, and advancement of the "Alliance for Progress."

In view of the foregoing, the questions presented, in the opinion of Government appellees, are as follows:

1. Whether appellants have standing to sue?
2. Whether appellants are here really seeking an advisory opinion, and hence for that reason too fail to present a "case or controversy" in the constitutional sense?

(1)

3. Whether, in view of the Congress' choosing in Section 212(a)(14) of the Immigration and Nationality Act to confer discretionary authority upon the Secretary of Labor to make certifications dealing precisely with the very kind of alleged economic competition for jobs appellants assert here, the matter is entirely committed to agency discretion and made wholly judicially-nonreviewable by statute?

4. Whether—assuming *arguendo* there is jurisdiction—in view of the sensitive foreign affairs considerations involved, should not the District Court have properly in the exercise of a sound judicial discretion abstained from taking jurisdiction over such a suit as this for equitable relief or mandamus?

5. Whether, if the merits need be reached, this Court should conclude that the long-standing administrative application of the immigration law—recognizing “alien commuters” as entitled to continue enjoying “immigrant” status, so long as such status is not interrupted—is correct as a matter of law?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,976

**TEXAS STATE AFL-CIO, ANTONIO AGUILAR, JULIA AMAYA,
ET AL., APPELLANTS**

v.

**ROBERT F. KENNEDY, ATTORNEY GENERAL, AND RAYMOND F.
FARRELL, COMMISSIONER OF IMMIGRATION AND NATURALIZA-
TION, GOVERNMENT APPELLEES,**

and

**THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES (LEYVA),
CONCEPCION AURORA CAGIGAS FRAJO, ET AL., INTERVENOR
APPELLEES**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

BRIEF FOR GOVERNMENT APPELLEES

COUNTERSTATEMENT OF THE CASE

Appellants (plaintiffs below) appeal from the Judgment entered by the District Court on April 11, 1963, dismissing this action with prejudice. (J.A. 108.)

In the District Court appellants sought a declaratory judgment and an order in the nature of mandamus against Government appellees (defendants below). Some nineteen individual aliens intervened as defendants in the action, both as individuals and as representatives of a class. They are the Intervenor appellees.

Appellants filed a motion for summary judgment. Both Government and Intervenor appellees filed motions to dismiss. Government appellees also filed a separate cross-motion for summary judgment.

The District Court heard all these motions together on January 15, 1963. That Court then took the case under advisement. By its Order and Judgment of April 11, 1963, the District Court granted Government and Intervenor appellees' motions to dismiss, and denied appellants' motion for summary judgment. Judgment was entered without opinion.

A. Nature of Litigation

This is unique litigation.

It involves "alien commuters"¹ and the established border accommodation which has been in effect along the Canadian and Mexican borders with respect to them for more than thirty-five years. Under this long-existent border practice, alien commuters have been regularly permitted to cross our borders daily without hindrance, commuting between their places of abode in neighboring Canada or Mexico and their places of employment in the United States. The practice has always been

¹ "Alien commuters" are words of art that have a technical immigration law meaning. The term describes aliens, initially lawfully admitted to the United States as "immigrants," who thereafter commute regularly from their abodes in adjacent Canada or Mexico to their places of work in the United States. They are deemed to maintain their status as lawfully-admitted "immigrants" so long as they continue to commute to regular employment in the United States. *And they are regarded as having the same "immigrant" status as any other "immigrant" aliens in this country.*

Alien commuters are as much a part of our permanent labor force as are any other workers in the United States. They should not be confused with the "braceros" who are imported into the United States for temporary employment (especially as farm laborers). Alien commuters initially enter with "immigrant" visas, just as do all other "immigrants." The braceros enter temporarily under an International Agreement between Mexico and the United States; pursuant to statute their employment conditions here are supervised by the U.S. Department of Labor; and when their temporary employment is finished, they return to Mexico.

Nor should the alien commuters be confused with "wet-back" aliens. As indicated, the alien commuters must comply with all provisions in the immigration law to qualify for "immigrant" status. The "wet-backs" are aliens who effect surreptitious entry in violation of the immigration law.

deemed by the Administrators to be in full accord with the immigration law.

The preexisting immigration statutes were codified in 1952 into the Immigration and Nationality Act.² The Immigration authorities then determined that the 1952 Act made no change in the long-standing recognition given the status of alien commuters as "immigrants" under the immigration law. And the established border accommodation with respect to them has continued unaltered to the present time.

Appellants make a broadside attack here. They seek to bring to an abrupt end by court order the entire long-standing alien commuter border accommodation in effect along both our Canadian and Mexican borders. They claim it is contrary to the immigration law.

Appellant Texas State AFL-CIO is a voluntary labor organization composed of affiliated labor organizations operating in the State of Texas.³ The individual appellants, some 188 in number, are residents in five Texas border counties.⁴ Appellant Texas State AFL-CIO sues in a representative capacity on behalf of its members and the members of organized labor affiliated with it.⁵ The individual appellants sue on their own behalf "and as representatives of a class of persons who are so numerous as to make it impracticable to bring them all before the Court."⁶

They have brought this action against the Attorney General and Commissioner of Immigration and Naturalization. They do not complain of any action being taken with respect to them by these Government appellees. Rather, they are complaining

² 66 Stat. 166, *et. seq.*, 8 U.S.C. 1101, *et. seq.*

³ Complaint, par. 1, J.A. 4.

⁴ *Id.*, par. 2. J.A. 5.

⁵ *Id.*, par. 3. J.A. 7.

⁶ *Id.*, par. 4. J.A. 7. It is to be noted that these individual appellants have not attempted in any way to define the outer limits of the class they purport to represent, and are silent as to their own individual occupations. It has not been shown on the record before this Court to what extent, if any, alien commuters compete with them for jobs. We therefore are unable to know who else is "similarly situated" to them. See *State of California v. Rank*, 293 F. 2d 340, 348 (9th Cir. 1961), *rev'd on other grounds sub nom. Dugan v. Rank*, 372 U.S. 609 (1963); *D.A.A. Motors, Inc. v. General Motors Corp.*, 22 F.R. Serv. 23a. 11, case 1, p. 364 (S.D. N.Y. 1956).

of the inaction of Government appellees with respect to *another* group of persons. They claim the Attorney General and Commissioner of Immigration and Naturalization are generally failing to enforce the immigration law properly as to all alien commuters.

But they do not present in their complaint the case or cases of any particular alien commuter or commuters whose daily reentry to pursue regular employment here in fact directly and substantially affects their own personal job interests or the job interests of the class they purport to represent.

The complaint asserts appellants' interest to be free from economic competition for jobs by alien commuters crossing into Texas from Mexico along a relatively limited stretch of our Southern border. Yet, appellants seek to obtain a court opinion broadly declaring what shall be the law governing *in futuro* the entire practice of daily readmission of alien commuters, whether crossing the Canadian or the Mexican border. And the order in the nature of mandamus which appellants seek would require the Immigration authorities to bar alien commuters from re-entering to pursue their regular work in the United States, so long as they continue to maintain abodes in neighboring Canada or Mexico.

Appellants claim that, as a "result" of the Government's non-exercise of its sovereign power to exclude alien commuters, the economy of the United States along the Mexican border "has severely suffered." They further allege that "especially in the Texas counties bordering the Rio Grande River, serious unemployment, low wages and forced migration of United States residents have been proximately caused by the vast influx of aliens who commute daily from their residences in Mexico to jobs in Texas." And they also assert that the individual appellants "are typical and representative of tens of thousands of persons similarly situated along the Rio Grande River who have been unemployed while commuting aliens * * * work * * * at jobs which residents * * * [are] * * * capable of performing." ⁷

⁷ Complaint, pars. 18-19, 24-25, J.A. 18, 19, 22.

The Intervenor appellees are individual Mexican alien commuters. Their own affidavits have been filed in this cause. Those affidavits^{*} disclose:

Alien commuters are not late-comers into the American labor market. Their ranks include aliens long employed^{*} at jobs in the United States. It appears that some of them are probably as integral a part of the permanent American labor force as any other American workingmen. And some are even members of American labor unions affiliated with appellant Texas State AFL-CIO.^{**}

B. Jurisdictional Defenses Raised by Appellees

In the District Court, Government appellees contended the court did not have jurisdiction, on the following grounds: (1) Appellants lack standing to sue; (2) Appellants are seeking an advisory opinion on an abstract question of law; and (3) The litigation essentially involves the making of a determination entirely committed to agency discretion and made judicially nonreviewable by statute.¹¹

^{*} When jurisdiction is challenged as it has been here, the court is not restricted to consideration of the allegations in the complaint. It may conduct an inquiry into its jurisdiction. This may appropriately be done by affidavits. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 277-278 (1936); *Wetmore v. Rymer*, 169 U.S. 115, 120, 126-127 (1898). And where a jurisdictional issue is raised, the burden is on the party claiming the court has jurisdiction to prove all jurisdictional facts. *KVOS, Inc. v. Associated Press*, *supra*, 299 U.S. at 278; *Birmingham Post Co. v. Brown*, 217 F. 2d 127, 130 (5th Cir. 1954). The affidavits filed by Intervenor appellees were specifically incorporated into and made a part of Government appellees' motion to dismiss on jurisdictional grounds. J.A. 82.

^{*} The affidavits reveal that Maria F. Carrera has been commuting since the 1920's; Juana R. deAlarcon since 1923; Francisco Garcia since 1929; Vicente V. Gil since 1929; Jesus Maria Gonzalez since 1927; and Adalberto Lopez since 1924.

^{**} The affidavits further reveal that Francisco Garcia and Lucia Parra-Vasquez are members of the Amalgamated Clothing Workers of America, AFL-CIO; and M. S. Guzman C., Francisca de la Cruz and Petra H. Gomez are members of the Amalgamated Textile Workers of America, AFL-CIO. It thus appears that appellant Texas State AFL-CIO has some conflicting interests here in its capacity as representative of organized labor in Texas, and that its claim alien commuters are inimical to labor organizing is questionable.

¹¹ Government appellees' motion to dismiss. J.A. 81.

Intervenor appellees also contended the District Court lacked jurisdiction. An additional ground on which they based this contention was that the basic issues here are political questions.¹² Government appellees took a different approach to the "political" aspect of this case, which concerns our foreign relations. Their approach to this problem is set forth under "C" below.

C. Impact of Case on Our Foreign Relations

This case bears importantly upon our foreign relations. The alien commuter border accommodation has through the years contributed significantly to the friendly relations the United States enjoys with Canada and Mexico. Its roots lie deep in the proud tradition of America's "good neighbor" foreign policy.

Appellants in their complaint advance the claim that this long-established border accommodation with respect to alien commuters creates "animosity between the United States and its good neighbor Mexico."¹³ Government appellees filed in this litigation an affidavit¹⁴ by the Secretary of State, the Honorable Dean Rusk. The affidavit was filed only incidentally to meet the allegation in paragraph 22 of appellants' complaint. It also had a much larger purpose.

The Secretary of State has certified in this affidavit: In his judgment, "the present practice with regard to commuters

¹² Intervenor appellees' motion to dismiss. J.A. 80.

¹³ Complaint, par. 22. J.A. 21. Nothing could be further from the truth than this claim.

¹⁴ J.A. 83. Appellants have attacked this affidavit as containing hearsay, conclusions and immaterial statements; assert it was patent error for the District Court to consider this affidavit; claim that the affidavit has "no legitimate place in the lawsuit"; and allege its filing was "prejudicial and improper." All of this they say in a footnote of their brief. App. Br., p. 35, fn. 43.

Since it was appellants who first raised the foreign affairs aspect of the case by claiming in their complaint that the border accommodation is creating animosity between the United States and Mexico, it comes with poor grace for them now to bleat that the matter has "no legitimate place in the lawsuit." The relations between the United States and its neighbors, South and North, of course come within the special competence of the Secretary of State. And his views in that regard are entitled to respect. See fn. 17 *infra*.

across the United States-Mexican border contributes to the friendly relations between the United States and Mexico." Further, in his judgment, "a sudden termination of the commuter system as the result of a court decision would have a seriously deleterious effect upon our relations with Mexico." And "the harm to United States-Mexican relations which * * * [he] * * * believe[s] would be the result of a termination of the commuter practice could seriously jeopardize the Alliance for Progress in Mexico, and * * * [because of the size and influence of Mexico in Latin America] * * * thus in all Latin America." Also, "the Government of Canada, like the Government of Mexico, has expressed its concern over the present litigation, and an adverse decision could also affect our relations with Canada and the status of United States nationals and property employed in that country." Moreover, the affidavit sets forth the official notice the Secretary took of matters of common knowledge as to the "strong and mutually beneficial economic relations" which "have developed over the years along the border," and which knit the cities along both sides of the Mexican border truly "into single economic communities." The affidavit concludes:

For the[se] * * * reasons it is my opinion that a judgment on the merits in this case would be undesirable from the standpoint of the foreign relations of the United States. A decision which resulted in a sudden change in the commuter practice at our borders would adversely affect our relations with Mexico, with Canada, and perhaps with other nations of the Western Hemisphere.

The Secretary of State's affidavit¹⁵ was specifically incorporated into and made a part of Government appellees' motion

¹⁵ The Secretary of State's affidavit also referred to negotiations with the Mexican Government looking to see whether a diplomatic adjustment can be reached, to accommodate the conflicting interests involved. In their fn. 43, App. Br., p. 35, appellants state that they "have received no evidence of any such negotiation either then or during the year since the affidavit was filed." We note that discussions have been had by the Department of State with both the Mexican and Canadian Governments.

Appellants are less than candid in making this statement. Government counsel made known to appellants' counsel several times during the pen-

to dismiss.¹⁶ Upon the basis of this affidavit, Government appellees interposed the objection that—even assuming *arguendo* there is jurisdiction—in view of the sensitive foreign considerations involved, the District Court should properly in the exercise of a sound judicial discretion abstain from taking jurisdiction over this suit for equitable relief or mandamus.

Appellants filed a "Reply" to the Secretary of State's affidavit, attaching some newspaper clippings to show "the [alleged] feeling of most of the people in Texas who are concerned with this problem [of the alien commuters]." They objected to the Secretary's affidavit as a "conclusionary and hearsay statement." But appellants there failed to submit any substantial countervailing material to meet the force of that affidavit.¹⁷

dency of this litigation the extent to which the basic problem could be adjusted within the framework of the immigration law—as Government appellees understand the law to be—to accommodate the interests of the Mexican and Canadian Governments, as well as appellants' interest (which Government appellees view as not rising to the dignity of any legal right enforceable by judicial process—see our Argument *infra*). Appellants' counsel indicated this would be less than a satisfactory solution, insofar as appellants are concerned. Appellants evidently prefer seeking a "whole loaf" solution in the courts, rather than take a "statesmanlike" approach which would accomplish a reasonable accommodation of the conflicting interests involved.

¹⁶ J.A. 81.

¹⁷ We think that in their brief appellants take a curiously myopic view of this aspect of the case. App. Br., p. 35, fn. 43. They erroneously throw into hotchpot Government appellees' objection to the court's exercise of jurisdiction, premised upon the litigation's impact upon our foreign relations, with Intervenor appellees' "political question" objection. And they would want to toss the whole mixture off lightly. They say that "the 'political' question is hardly worthy of comment."

Appellants are completely silent in their brief as to Government appellees' contention, documented by the Secretary of State's affidavit, that this litigation necessarily involves sensitive foreign affairs considerations and that a decision adverse to the Government would have a seriously deleterious effect upon the foreign relations of the United State. Appellants were the first to inject the foreign affairs aspect of the case by the incorrect allegation they made in par. 22 of their complaint. When directly challenged, they failed to meet the Secretary of State's affidavit by any substantial countervailing material. As set forth in fn. 8 *supra*, the court may for jurisdictional purposes conduct an inquiry by any appropriate means, including affidavits. The Secretary of State expressed his judgment in the affidavit as to a foreign affairs matter falling within his special competence. Such matters nor-

D. Posture of Litigation on the Appeal

The District Court granted Government appellees' motion to dismiss. Quite clearly, it never reached the merits.

In their separate cross-motion for summary judgment and opposition to appellants' motion for summary judgment,¹⁸ Government appellees contended that, in the event the District Court reached the merits for purposes of decision, the Court should grant them summary judgment on the ground that there was no issue as to any fact material to *their* motion for summary judgment, and they were entitled to judgment as a matter of law. In opposing appellants' motion for a summary judgment,¹⁹ Government appellees stated (*inter alia*):

2. * * *

(A) * * *;

(B) * * *;

(C) Assuming the Court may properly reach the merits here, defendants—not plaintiffs—are entitled to judgment on the merits as a matter of law; and

(D) There are in dispute the following issues of fact, in any event barring the grant of summary judgment to plaintiffs in the present posture of this litigation:

(i) The material issue whether there is in fact any direct causal relationship whatever between, on the one hand, the Government's action, of which plaintiffs complain, in permitting alien commuters continued entry to the United States as immigrants previously lawfully admitted to the United States who have "the status of having been lawfully accorded the privilege of residing in the United States as an immigrant in accordance with the immigration laws, such status not having changed,"

mally deal with imponderables unsuited to judicial inquiry. And the case authorities (cited in our Argument *infra*) indicate that the courts respect the views of the Executive in such matters as this.

We can only infer that appellants are really unable to meet the force of the Secretary of State's affidavit, and it is for this reason that they seek to pass the matter over lightly in a footnote to their brief.

¹⁸ J.A. 92.

¹⁹ *Idem*.

and, on the other hand, the personal economic injuries plaintiffs assert in their complaint; and

(ii) (If deemed material by the Court) the issue whether such Government action of which plaintiffs complain here causes "animosity between the United States and its good neighbor Mexico" as alleged by plaintiffs.

Government appellees also filed the Statement required by District Court Local Rule 9(h) in opposition to appellants' Statement of Material Facts. They adopted by reference the statement of issues set forth in paragraph 2(D) of their opposition (set forth above) with the qualification that, in their view, the issue set forth in paragraph 2(D)(ii) was immaterial for purposes of disposing of the case on its ultimate merits.

The recitation of purported facts in appellants' brief on this appeal incorporates references to the deposition taken of one Larry Parnass, and attached exhibits for identification. Even if the deposition and exhibits were admissible (and appellees maintain they are not²⁰), his non-record material does not

²⁰ Larry Parnass, an attorney in the Dallas Regional Office of the Department of Labor, served as the representative of the Secretary of Labor in responding to appellants' subpoena. The exhibits identified during the deposition-taking refer to samplings of companies which employ commuters; interviews conducted by a number of persons in the Department of Labor to gather information as to the role of the alien commuter in local Texas border labor situations; and gross statistics by the Texas Employment Commission that failed to differentiate between resident aliens and the alien commuters. The exhibits, marked only for identification are known as the Laredo Report, the El Paso Report, and the Peyton Packing Company Report. Government appellees objected to the admission or consideration in any way of the deposition and its accompanying reports, in connection with the District Court's consideration of this case.

Since the District Court dismissed the case on jurisdictional grounds, no ruling was made as to the admissibility of the deposition and the reports. If this Court reaches the merits, the question of the admissibility of this material remains. These reports are hearsay on hearsay: reports gathered through random conversations by interviewers in the field and related in the deposition by one who was not even present during most of the interviews. The reports are completely non-record here. And it appears settled that reports—not made as a matter of routine (such as records of account and minutes of proceedings of a department)—which concern controversial matters and rest on conclusions and hearsay, and which have been gathered from random sources without adequate safeguards to insure the truth, are inadmissible. *United Mine Workers of America v. Patton*, 211 F. 2d 742, 751 (4th Cir.) cert. denied 348 U.S. 824 (1954); *Olender v. United States*,

establish any necessary causal relationship between the Government's permitting alien commuters continued entry to the United States, and the personal economic injuries which appellants allege. The reports marked as exhibits for identification deal in large measure with such occupations as maids and charwomen, waiters, dishwashers, bar boys, etc. These are all essentially non-unionized occupations, and hence do not involve competition for jobs with members of appellant Texas State AFL-CIO. Particularly indicative of the unclear state of facts as to appellants' claim of injury and standing generally, we note, is the statement appearing in the Laredo Report (one of the reports upon which appellants rely) that as of the date of the report "approximately 150 of the 225 member local (International Ladies Garment Workers Union Local 35) are commuter aliens." (P. 14, pl. ex. for ident. No. 1.)

Apart from the problem of appellants' injury and standing generally, Government appellees agree there is here no issue as to any material fact. No factual issue going to the merits is in dispute. As set forth in their Statement pursuant to District Court Local Rule 9(h) in the court below, Government appellees continue to recognize alien commuters as being entitled to the "immigrant" status they have long possessed, so long as such status is not interrupted.

Accordingly, we take the view that—if this Court determines (1) the District Court had proper jurisdiction over this cause; and (2) the District Court should in the exercise of a sound judicial discretion have necessarily taken jurisdiction—then this Court may reach the ultimate merits on this appeal.

While the District Court did not reach the merits, appellants in their brief on this appeal mainly argue the merits and devote only a few pages at the end of the brief to the jurisdictional issues. We believe that orderly procedure on this appeal calls for consideration by this Court of the jurisdictional issues before the merits can properly be reached.

210 F. 2d 795, 800-802 (9th Cir. 1954). See *United States v. Grayson*, 166 F. 2d 863 (1948). Cf. *Washington Coca Cola Bottling Works v. Tawney*, 98 U.S. App. D.C. 151, 152, 233 F. 2d 353, 354 (1956). The cases appellants cite in their brief (App. br., p. 5, fn. 12) do not hold otherwise.

SUMMARY OF ARGUMENT

(A) The District Court correctly dismissed this action for want of jurisdiction. (B) In any event, it was proper for the District Court, in the exercise of a sound judicial discretion, to abstain from taking jurisdiction in equity or mandamus proceedings here in view of the sensitive foreign affairs considerations involved. And (C) If the merits need be reached, the judgment of the District Court should be modified (as authorized by 28 U.S.C. 2106) so as to indicate dismissal of the case on the merits, and, so modified, affirmed. In support of these propositions, we argue:

I. No jurisdiction

Appellants are barred from maintaining this suit by a number of insuperable jurisdictional obstacles:

A. Lack of standing to sue**1. No legal right, and no statutory aid to standing**

Appellants cannot show a direct injury done or threatened to a particular, personal, legally-protected right of their own. No legal right is invaded when lawful competition is made more economically injurious by governmental action which facilitates or aids such competition.

Appellants have no legal right to be free from competition for work. The Immigration authorities have no authority, independently of statute, to exclude "immigrant" alien because the labor market in a particular area of the United States may be overstocked. "Immigrant" aliens, whether coming from Ghana, Mexico, Canada, or anywhere else, have a perfect legal right under the immigration law to compete economically with other workers in the United States for jobs—unless the Secretary of Labor has issued a certification under Section 212(a) (14) of the Immigration and Nationality Act to the Attorney General and the Secretary of State. In that statutory provision, the Congress chose to confer on the Secretary of Labor exclusive authority to determine when additional immigration is causing such injury to American labor as to warrant imposing a bar to the entry of new "immigrants."

No Section 212(a)(14) certification by the Secretary of Labor has been issued in this case. In any event, the Congress saw fit to exempt "immigrants" previously lawfully admitted as such—including the "alien commuters"—from the Section 212(a)(14) bar. And no other section in the current immigration statute confers any legal right of a personal nature on appellants, or gives them statutory aid to maintain suit in vindication of the public interest in proper administration of the immigration law. There is no indication anywhere in the Immigration and Nationality Act, or in its legislative history, or in the entire background of the immigration law, that the Congress meant to confer a right to obtain judicial review upon third parties, such as the appellants here. Nor can appellants properly point to any other statute which gives them a right to maintain this suit.

2. Claimed injury is too indirect and remote

To have standing to sue, absent statutory aid to standing, appellants would have to show not only a legal right, but also a substantial, direct and proximate legal injury to such right, caused or threatened by the action of which they complain. They cannot make any such showing here. Their claimed injury is from economic competition for jobs. Such job competition occurs entirely apart from the governmental "inaction" permitting the alien commuters to enter as returning "immigrants" when they cross the border. Hence, the connection between the governmental "inaction" and appellants' claimed injury is too indirect and remote to give them standing to sue here.

B. Advisory opinion sought

Appellants do not seek to have the court act in the cases of any alien commuter or commuters whose regular entry affects them personally. They seek to obtain a court opinion broadly declaring the law as to all alien commuters. It thus appears that what appellants are really seeking here is an advisory opinion on an abstract question of law. The judicial power under Art. III, Sec. 2, of the Constitution does not extend to giving advisory opinions.

C. Matter entirely committed to agency discretion and made wholly judicially-nonreviewable by statute

The very subject matter of the alleged economic injury appellants assert here has been entirely committed to agency discretion and made judicially nonreviewable by Section 212(a) (14) of the Immigration and Nationality Act. The determination called for by that section patently calls for extensive investigation and application of the Department of Labor's expertise, and the exercise by the Secretary of Labor of a broad discretionary judgment, in a field totally unsuited to judicial inquiry.

And the whole statutory scheme, purpose and history of the immigration law tend to show that the Congress here meant to leave the matter to the Administrators' special competence and judgment, without intervention by the courts.

II. Abstention from taking jurisdiction proper

Assuming *arguendo* there is jurisdiction, the District Court yet possessed a sound judicial discretion to decline to entertain jurisdiction over such a suit as this for equitable relief or mandamus. Sensitive foreign affairs considerations are involved here. The Secretary of State has so certified by affidavit, and has expressed his judgment and views on the foreign affairs aspect of the case. It is well settled that the foreign affairs judgments of the Executive are entitled to respect. They necessarily deal with imponderables unsuited to judicial inquiry. And they involve "large elements of prophecy" in an area charged exclusively to Executive competence by the Constitution.

Hence, in any event, furtherance of the public interest in continued "good neighbor" relations with Mexico and Canada, and advancement of the Alliance for Progress definitely warranted the District Court to abstain from taking jurisdiction over this cause.

III. If merits reached, dismissal on merits proper

Assuming that the Court need reach the merits here, this Court should properly conclude that the long-standing admin-

istrative application of the immigration law, recognizing alien commuters as entitled to continue enjoying "immigrant" status, so long as such status is not interrupted, is correct as a matter of law.

This conclusion essentially turns upon the technical, word-of-art, meaning of the term "immigrant", as it has long been used in the immigration law. The Immigration and Naturalization Act carries forward unchanged the word-of-art meaning of this term as it early evolved under the prior immigration statute.

All aliens seeking to come to the United States to work on a continuing or indefinite basis have been classified as "immigrants" ever since 1927, irrespective of their intentions as to residence. This administrative application of the Immigration Act of 1924 was affirmed by the Supreme Court in the famous case of *Karnuth v. United States ex. rel. Albro*, 279 U.S. 231 (1929). Ever since then alien commuters have been consistently regarded by the Administrators as "immigrants." Like all other "immigrants", alien commuters have been required to secure an "immigrant" visa from an American consular officer abroad, before initially effecting lawful entry as "immigrants." Under the law, this qualifies them for the privilege of establishing permanent residence in the United States. But the law has never been construed so as to require an "immigrant" to mean to, or actually establish, residence in the United States.

By operation of the returning "immigrant" provisions in the Immigration Act of 1924; the establishment of a border-crossing identification card procedure; and the reciprocal border facilitations incident to our "good neighbor" relations with Canada and Mexico, the alien commuter border accommodation was early evolved. And the Immigration authorities have through the years since then consistently recognized alien commuters as having lawfully-admitted "immigrant" status, and have regarded their daily commuting departures to be temporary absences not affecting their established "immigrant" status in the United States, so long as such status has not been interrupted.

In drafting the Immigration and Nationality Act (which was enacted in 1952 as a codification of all the preexisting immigration statutes), the Congress was well aware of the Administrators' long-standing recognition of the alien commuters' status as returning "immigrants", and expressed no dissatisfaction with it, or with any part of the continuing alien commuter border accommodation. The Immigration and Nationality Act carries forward into current law essentially unchanged the technical meanings and applications given under the prior law to the word-of-art terms which had provided the legal basis for the Administrators' long-standing recognition of the returning "immigrant" status of the alien commuters. Accordingly, we conclude, the Immigration authorities' long-standing and consistent administrative interpretations has had both express and implied congressional acquiescence.

Following enactment of the Immigration and Nationality Act, the administrative recognition given alien commuters as entitled to continue enjoying "immigrant" status went on interruptedly. And some two years thereafter, an official ruling was made that the Immigration and Nationality Act carries forward into current law the existing alien commuter border accommodation.

Hence, even if this Court is not prepared to find express acquiescence by the Congress, the Court should at least agree that we are here concerned with a long-standing, contemporaneously-made, practical application of the immigration statutes, in effect since 1927, by the Administrators charged with making the statutory provisions work effectively. Hence, the Administrators' consistent interpretation is entitled to great weight and should prevail here.

Finally, the opinion by Judge Youngdahl in *Amalgamated Meat Cutters, etc. v. Rogers*, 186 F. Supp. 114 (D.C. 1960), is in error, and to the extent necessary should be overruled. The opinion is replete with basic errors and misconceptions as to the operation under, and the technical, word-of-art, meanings of, the various pertinent terms in the immigration law.

ARGUMENT

I. The District Court lacked jurisdiction over the subject matter

At the threshold, we believe, appellants are barred from maintaining this suit by a number of insuperable jurisdictional obstacles.

A. Appellants lack standing to sue

1. Appellants have no legal right, and no right to maintain suit here, to be free from economic competition for jobs

It is well settled that, to have standing to maintain a suit for relief against governmental action, a complainant must—in the absence of statutory aid to standing²¹—show a direct injury done or threatened to a particular, personal, legally-protected right of his own. It is not enough to assert an alleged injury to a right the complainant shares in common with the public generally. And it is clear that an interest in the proper execution of the laws is insufficient to confer standing. *Stark v. Wickard*, 321 U.S. 288, 290, 304 (1944); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Massachusetts (Frothingham) v. Mellon*, 262 U.S. 447, 487-488 (1923).

It is equally well settled that no one has a common-law or constitutional legal right to be free of economic injury from competition. And, (in the absence of a statute conferring a right to sue in vindication of the public interest) economic injury from competition does not provide standing to sue. No legal right is invaded when lawful competition is made more

²¹ Where no personal legal right of a complainant is invaded, but he can show he is "adversely affected or aggrieved" by reason of his sustaining economic injury or disadvantage from governmental action, then the Congress may by statute—conformably to the "case or controversy" limitation of Art. III, sec. 2, of the Constitution—confer on such an "interested" party standing to sue in vindication of the public's interest in proper administration of the law. See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956); *Scripps-Howard Radio, Inc., v. Federal Communications Commission*, 316 U.S. 4, 14 (1942); *Kansas City Power & Light Co. v. McKay*, 96 U.S. App. D.C. 273, 279-282, 225 F. 2d 924, 931-934, cert. denied 350 U.S. 884 (1955). As we develop *infra*, appellants here cannot show that the Congress has conferred on them any statutory aid to standing as "adversely affected or aggrieved" parties, so as to be able to maintain suit in the interest of the public in proper administration of the law.

economically injurious by governmental action—even assuming such governmental action is invalid—which facilitates or aids such competition. Such damage, not involving direct governmental invasion of any vested legal right, will not support a cause of action or a right to sue. It is a case of *damnum absque injuria*. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 137–140 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478–484 (1938); *City of Atlanta v. Ickes*, 308 U.S. 517 (1939); *Benson v. Schofield*, 88 U.S. App. D.C. 424, 427–428, 236 F.2d 719, 722–723 (1956), *cert. denied*, 352 U.S. 976 (1957); *Kansas City Power & Light Co. v. McKay*, *supra*, 96 U.S. App. D.C. at 277–280, 225 F.2d at 928–931; *United Milk Producers of New Jersey v. Benson*, 96 U.S. App. D.C. 227, 229, 225 F.2d 527, 529 (1955).

In the *TVA*, *Alabama Power* and *Kansas City Power & Light* cases, the prospective and existing economic competition from the establishment and operation by municipalities and cooperatives of electric power distributing systems concededly was seriously injurious to the complainant private electric power utility companies. Therefore, it was clear that the private utility companies had a real interest in obtaining an adjudication of the merits of the ultimate issue they raised as to the legality of the governmental action they challenged as being contrary to law. And the private utility companies claimed the destructive competition they faced was exclusively produced by such allegedly illegal governmental action.

Yet, the claims advanced by the private utility companies were determined to be in reality simply an objection to the lawful economic competition they would suffer if the allegedly illegal Government programs they challenged came to fruition. Since such economic competition was itself lawful, the private utility companies were held to have no legal right in the matter. Hence, they had no standing to challenge the allegedly illegal governmental action making such lawful economic competition possible. And they were unable to obtain an adjudication as to the lawfulness of the governmental action involved.

In a companion case to *Alabama Power*, the Supreme Court determined that the complainant private electric power utility companies lacked standing to sue, in the teeth of a lower court

finding the Federal Administrators had acted illegally. Nevertheless, the economic competition produced by such governmental action being itself lawful, "no legal right of petitioners was thereby invaded." *Duke Power Co. v. Greenwood County*, 302 U.S. 485, 490 (1938). And in *Alabama Power*, the Court stated (302 U.S. at 480-481):

* * * [T]hese municipalities have the right * * * to engage in the business in competition with petitioner [Alabama Power Co.], since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.

* * *
If there are conditions under which two distinct transactions, neither of which, apart, constitute a judicially remedial wrong [i.e., a legal right entitled to judicial enforcement, and a direct invasion of such legal right], may be so related to one another as to afford a basis for judicial relief, such conditions are not to be found in the circumstances of the present case. [Bracketed material supplied.]

We submit, the case of the appellants here is indistinguishable on principle from that of the private utility companies in the cases cited. Appellants have no legal right to be free from competition for work. No such legal right is recognized at common law or by the Constitution for laborers, any more than it is for businessmen. Furthermore, as we shall develop, the statutory provisions on which appellants purport to rely here give them no such personal legal right. Hence, whether the economic competition for jobs comes from the alien commuters entering daily to work at their established employment in this country, or from other aliens also entering as "immigrants" to work in this country, or from other aliens or citizen workers in the United States, appellants can assert no exclusive legal right, personal to themselves and recognized by law, to be free from economic competition for jobs.

The Immigration authorities have no power, without statutory direction from the Congress, to exclude alien "immigrants"

because the labor market of the United States may be overstocked. *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915). And, alien "immigrants" in the United States have as much right to earn a livelihood in ordinary business occupations as citizens. *Truax v. Raich*, 239 U.S. 33, 39-43 (1915).

All "immigrant" aliens, whether coming from Ghana, Mexico, Canada, or anywhere else, thus normally have a perfect legal right to enter under the immigration law. Yet, their coming can affect the labor market in a particular locality. *E.g.*, if all the "immigrant" aliens coming from a country with a quota of one hundred "immigrants" per year were all to settle in one small community, they would of course profoundly alter its local economy and labor market. And, in Section 212(a)(14)²² of the Immigration and Nationality Act, the Congress has chosen to confer on the Secretary of Labor exclusive discretionary authority to determine whether the coming of additional "immigrants" is causing such injury to American labor in a particular area of the country to warrant imposing a statutory bar to their entry. Section 212(a)(14) provides (in pertinent part):

(a) * * * [T]he following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States:

* * * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (b) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed. * * *

²² 66 Stat. 182, 8 U.S.C. 1182(a)(14); hereinafter referred to as "Section 212(a)(14)."

In the present case the Secretary of Labor has not issued any Section 212(a)(14) certification as to the economic effect the entry of new "immigrants" will have upon workers in the localities where the appellants are located. The absence of such a certification is a complete bar to any argument by appellants that they have standing because the entry of "immigrants" adversely affects their economic opportunities for jobs. The Congress specifically provided in Section 212(a)(14) that the Secretary of Labor, not the courts on application of individual labor unions or individual workers, should make determinations to protect American labor from the competition of "immigrants" coming to the United States to seek work in particular localities.

Since the Secretary of Labor has here issued no Section 212(a)(14) certification, the applicability of such a certification to the commuters is not an issue in this lawsuit. In any event, such a certification is applicable only to "immigrants" who are seeking *initial* admission to the United States. The commuters (as set forth in the Argument on the merits *infra*) are "immigrants" within the technical immigration law meaning of the term, who have been *previously* lawfully admitted as such and who continue to enjoy "immigrant" status in the United States so long as that status is not interrupted. By definition, they are not aliens seeking *initial* admission to this country. Hence, Section 212(a)(14) has no applicability to them.

Appellants in their brief have understandably not sought to invoke the Section 212(a)(14) provisions as a statutory basis of standing to sue. They have sought, however,²³ to invoke the provisions in Sections 101(a)(15)(H)(ii) and 214(a), (b), and (c) of the Act²⁴ for that purpose.

Both those sections concern the "nonimmigrant" category aliens "coming *temporarily* to the United States to perform . . . *temporary services or labor*, if unemployed persons capable of performing such service or labor cannot be found in this country." [Emphasis supplied.] Section 101(a)(15)(H)(ii) describes that "nonimmigrant" category; while Section 214(c) prescribes the petition procedure to be followed by an

²³ App. Br. p. 41.

²⁴ 66 Stat. 166, 189; 8 U.S.C. 1101(a)(15)(H)(ii) and 1844(a), (b), and (c).

importing employer in seeking to obtain the Attorney General's approval for the importation of such a temporary worker.

These sections are obviously inapplicable here. *First*, it has been settled, ever since *Karnuth v. United States ex rel. Albro*, 279 U.S. 231, was decided in 1929, that aliens coming to the United States to perform labor for hire on a continuing or indefinite basis are aliens of the "immigrant" class. Hence, the alien commuters who perform labor for hire on a continuing or indefinite basis cannot be classified as "nonimmigrant" aliens "coming temporarily to the United States to perform * * * temporary services or labor."

Consequently, we submit, the sections on which appellants rely in this connection are wholly inapplicable in the cases of alien commuters (or any other "immigrant" aliens) entering the United States to perform labor for hire on a continuing or indefinite basis.

Second, at the hearing before the District Court on January 15, 1963, we understood appellants' counsel to concede, in answer to that Court's query, that appellants have been given no statutory right to intervene in any Section 214(c) administrative petition matter before the Attorney General. If, as it appears, appellants concede that the Congress gave them no statutory standing to participate as "aggrieved" or "interested" parties in any administrative petition proceedings under Section 214(c) of the Act, then we do not perceive how they can claim they derive any other personal rights from Section 214 of the Act. There is no particular language in Section 214(c) indicating the Congress' intent to give interested American workers any personal legal rights in the matter. If, as appellants apparently concede, the statute is to be read as giving them no right to intervene administratively, then, by the same token, it gives them no right independently to obtain judicial review of any determination made administratively on a Section 214(c) application to import temporary workers.²⁵

Third, we maintain, consideration of the Immigration and Nationality Act in entire context, and in light of the whole

²⁵ See our discussion *infra* of the meaning of the phrase "adversely affected or aggrieved" as it appears in Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009(a).

statutory scheme, purpose and history of the immigration law, makes it clear that the Congress did not mean to confer by any of the provisions therein a personal legal right enforceable in the courts, or any right to sue as a party "adversely affected" or "aggrieved", upon any segment of the populace to contest immigration actions taken in the case of any particular alien or aliens.

Since the early days of the immigration law, the Congress has provided that administrative immigration decisions shall be "final". This, the Supreme Court has declared, has produced consistent recognition in the decided cases "that Congress . . . [has always] . . . intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234 (1953).

The right of the alien directly concerned to obtain judicial review has been traditionally restricted to the minimum required by the Constitution and the decided cases. Nowhere in the legislative history is there even the slightest intimation that the Congress meant to confer on anyone, other than the alien directly concerned, any personal legal rights whatever. As stated in *Stark v. Wickard*, *supra*, 321 U.S. at 306:

* * * To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege [i.e., a personal legal right] protected by judicial remedies.* * * [Bracketed material supplied.]

We think that—in the absence of any indication in the statute or its history that the Congress meant to depart from the traditional nonreviewability of immigration decisions to the fullest extent the Constitution and decisions allow—it must be concluded that the Congress did not mean, by any of the exclusion or other provisions in the immigration statute, to create any personal legal right enforceable in the courts upon anyone other than the alien directly affected.

Appellants in their brief²² have also sought to invoke the

²² App. Br. p. 39.

provisions in Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, as a statutory basis of standing to sue.

It is well settled that Section 10 of the Administrative Procedure Act is merely declaratory of the existing law as to standing to sue. It does not purport to change the established meaning of the term "legal wrong", or of the phrase "adversely affected or aggrieved * * * within the meaning of any relevant statute." *Kansas City Power & Light Co. v. McKay*, *supra*, 96 U.S. App. D.C. at 281, 225 F. 2d at 932; followed in *Harrison-Halsted Com. Group, Inc. v. Housing and Home Finance Agency*, 310 F. 2d 99, 104-105 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *Duba v. Schuetzle*, 303 F. 2d 570, 574-575 (8th Cir. 1962); *Sapp v. Hardy*, 204 F. Supp. 602, 605 (D. Del. 1962); *Gart v. Cole*, 166 F. Supp. 129, 134-135 (S.D. N.Y. 1958), *affirmed* 263 F. 2d 244, 250 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959).

As is made quite clear in *Kansas City Power & Light*: The term "legal wrong" as used in Section 10(a) of the Administrative Procedure Act retains the meaning of the term enunciated in the *Massachusetts, Alabama Power, TVA* and like cases. It continues to mean the existence of a personal legal right—either one recognized at common law or by the Constitution, or one statutorily created by the Congress in such terms as show the Congress thereby meant also to confer a right to its judicial enforcement—as well as a showing of a direct injury to such personal legal right by the action which the complainant seeks to have the courts review. And the term "adversely affected or aggrieved * * * within the meaning of any relevant statute" has a different significance than "legal wrong". The principles enunciated in such cases as *The Chicago Junction Case*, 264 U.S. 258, 267-269 (1924); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 254-259 (1930); and *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-477 (1940)²⁷ apply.

As we have discussed, the Immigration and Nationality Act contains no provisions—and appellants point to none—which specifically confer on any person "adversely affected or ag-

²⁷ The cases cited fn. 21, *supra*, also illumine the matter. See, in particular, Mr. Justice Reed's discussion, speaking for the Court, in *United States v. Storer Broadcasting Co.*, *supra*, 351 U.S. at 197-200 (1956).

grieved" a right to sue in vindication of the general public interest that the Administrators shall properly enforce the immigration law in accordance with the expressed will of the Congress. Had the Congress intended to confer any litigable rights upon any segment of the populace to maintain suit as "adversely affected or aggrieved" parties in the public interest, Congress would have included some special "standing" provision to that end, and certainly would have in its legislative reports discussed such a radical departure from the traditional nonreviewability of immigration decisions. We can find no intimation of any such radical change in any of the legislative reports accompanying the Immigration and Nationality Act.

It is noteworthy in this connection that such a special "standing" provision appears in most, if not all, the independent regulatory agency statutes. Customs is a parallel field to immigration; a special "standing" provision appears there.²⁸ Clearly, then, when the Congress means to confer litigable rights on any "aggrieved" parties to maintain suit in the public interest, it well knows how to do so by express provision to that end.²⁹

²⁸ It has long been settled that American businessmen have no common-law, constitutional, or statutory legal right to be free of competition from goods entering the United States. See *United States v. George S. Bush & Co.*, 310 U.S. 371, 379 (1940); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 318 (1933). But the Congress has by statute conferred upon any "American manufacturer, producer, or wholesaler" concerned a right to file a complaint with the Secretary of Treasury protesting the appraised value or classification of merchandise of a class or kind "manufactured, produced, or sold at wholesale by him," and to maintain an appeal to the courts, "with the same effect as an appeal by a consignee." Upon filing of any such protest or appeal, the consignee of the merchandise or his agent is required to be notified and has "the right to appear and be heard as a party in interest." The current statutory provisions appear in 19 U.S.C. 1516. No like provision for protest by any "aggrieved" party appears anywhere in the immigration statute.

²⁹ The Congress enacted the Fulbright Amendment to the Walsh-Healy Act, 66 Stat. 308, 41 U.S.C. 43a, specifically for the purpose of conferring special "standing" to sue upon "any interested person" to challenge determinations of the Labor Department made under the Act. The amendment established appropriate procedures for enforcing that interest both administratively and in the courts. This change was designed to overcome the "legal wrong" criterion found wanting in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). See the discussion of this point in *George v. Mitchell*, 108 U.S. App. D.C. 324, 326-328, 282 F. 2d 486, 488-490 (1960).

Appellants in their brief ³⁰ have cited certain cases to support their claim they have standing to sue here. We believe none of these case authorities helps them here:

- (1) *Amalgamated Meat Cutters, Inc. v. Rogers*, 186 F. Supp. 114 (D.C. 1960) (App. Br., p. 36)

First, we note, *Amalgamated* is clearly distinguishable. It involved a certification by the Secretary of Labor under Section 212(a)(14) of the Act.³¹

As we have discussed, no Section 212(a)(14) certification has been issued here. And appellants do not claim any statutory standing under Section 212(a)(14). Hence, whatever right to maintain suit Judge Youngdahl gleaned from the Secretary of Labor's certification under Section 212(a)(14), clearly any such right does not extend to the different provisions on which appellants seek to rely here. As we have shown, the particular provisions on which plaintiffs rest here are inapplicable under the circumstances of this case.

Second, we respectfully submit, *Amalgamated* is at best a questionable authority. And in our opinion it is in error on the issue of standing to sue.

Its bare conclusion that the complainant there had standing was not accompanied by any rationale. See 186 F. Supp. at 116-117. Of the four cases Judge Youngdahl cited (with a *cf.* reference), three are irrelevant to the standing question under discussion here: *Busby v. Electric Utilities Employees Union*, 323 U.S. 72 (1944); *McGrath v. Kristensen*, 340 U.S. 162, 169 (1950); *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999 (2d Cir. 1950).

The fourth case cited is Judge Youngdahl's own earlier decision in *Commercial State Bank of Roseville v. Gidney*, 174 F.

³⁰ App. Br., pp. 36-41.

³¹ In *Amalgamated*, there was a strike at the plant of the Peyton Packing Company in El Paso, Texas. The Secretary of Labor issued a Section 212(a)(14) certification that "the admission of any aliens to the United States for employment at the Peyton Packing Company of El Paso, Texas during the strike now in progress will adversely affect the wages and working conditions of workers in the United States similarly employed." The number of affected alien commuters dwindled during the progress of the strike, thus substantially mooted that litigation. Hence, no appeal was taken in the case and the strike was finally settled by agreement.

Supp. 770, 780-781 (1959). The case involved a number of points, including standing to sue. This Court affirmed that decision *per curiam*, simply expressing its agreement "in general". 108 U.S. App. D.C. 37, 38, 278 F. 2d 871, 872 (1960). Compare *Federal Home Loan Bank Board v. Rowe*, 109 U.S. App. D.C. 140, 141, 284 F. 2d 274, 275 (1960); *Union National Bank of Clarksburg v. Home Loan Bank Board*, 98 U.S. App. D.C. 204, 206, 233 F. 2d 695, 697-698 (1956). Also see *Whitney National Bank, etc. v. Bank of New Orleans, etc.*,—U.S. App. D.C.—, —F. 2d—(1963). We think consideration of the different conclusion reached in *Commercial State Bank of Roseville*, as to the congressional intent to grant litigable rights to competitors by 12 U.S.C. 36(c), on the one hand, from the result reached in *Rowe* and *Union National Bank of Clarksburg* cases, as to the congressional intent *not* to grant litigable rights to competitors by 12 U.S.C. 1464, on the other hand, bears out our main point here:

Absent the possession by a complainant of any common-law or constitutional personal legal right in the matter, the court must in each instance examine in total context the particular statutory provisions claimed to give standing, in light of the legislative history and any other available aids, to discern the true legislative intent in the matter.³² And the court must be convinced "from the nature and character of the legislation that Congress intended to create a statutory * * * [right] * * * protected by judicial remedies."³³ Or, failing that, the court must be convinced that the Congress meant to confer upon the complainant standing to maintain suit as an "aggrieved" party to vindicate the public interest in proper enforcement of the statute.³⁴ But if the court is not so persuaded, then the conclusion necessarily follows that the complainant lacks standing to sue.

We believe: When the provisions in Section 212(a)(14) of the Immigration and Nationality Act are considered in total statutory context, and in light of the entire legislative back-

³² *Kansas City Power & Light, supra*, 98 U.S. App. D.C. at 281, 225 F. 2d at 931.

³³ *Stark v. Wickard, supra*, 321 U.S. at 306.

³⁴ *Kansas City Power & Light, supra*.

ground and historical development of the immigration law, the conclusion inescapably follows that the Congress did not mean thereby to confer litigable rights on any interested American workers. Consequently, the determination reached by Judge Youngdahl in *Amalgamated* that the complainant there had standing to sue was in error.³⁵

(2) *United Mine Workers v. Coronada Coal Co.*, 259 U.S. 344 (1922) (and six other cases) (App. Br., p. 36)

Appellants have cited these cases solely for the proposition that appellant Texas State AFL-CIO, an unincorporated labor organization, may represent its individual members in this lawsuit. We take no issue with appellants on the proposition that an unincorporated labor organization may bring suit in its own interest, or in the interest of its members.

But that does not aid appellants here. They must still establish the justiciability of their complaint.

Texas State AFL-CIO can no more maintain this lawsuit in the absence of proper standing to sue, than can its individual members. It must show that it "has, or represents others having, a legal right or interest that will be injuriously affected." *Moffat Tunnel League v. United States*, 289 U.S. 113, 119 (1933). Alternatively, Texas State AFL-CIO must show that it has been granted by statute special "standing" to maintain suit as an "aggrieved" party, or as the representative of "aggrieved" parties, in vindication of the public interest in proper enforcement of the immigration statute. We believe neither Texas State AFL-CIO nor its individual members can make the requisite showing of standing to sue here.

(3) *Estrada v. Ahrens*, 296 F. 2d 690 (5th Cir. 1961) (App. Br., p. 39)

We do not perceive that this case is at all apposite here.

The plaintiffs in *Estrada v. Ahrens* were the aliens directly

³⁵ On careful reading of the *Amalgamated* opinion, we have become convinced Judge Youngdahl failed to appreciate the need—in order properly to resolve the "standing" issue in the case—to consider the Section 212(a) (14) provisions in their total statutory context, and in light of the legislative background and historical development of the immigration law.

affected by the challenged agency action. They sought judicial review of the immigration decision excluding them. Thus, they were asserting a claim long regularly recognized under the immigration law as entitled to judicial protection (at least to the extent the Constitution and decided cases require). There is no question but that an alien who is physically present and seeking entry to the United States has a right to obtain limited judicial review of an excluding decision made in his own case.

The contention made by the Government there was that these plaintiffs lacked standing because they were at the time they initiated their action "nonresident aliens absent from the country." 296 F. 2d at 692. The Court of Appeals held that under the particular circumstances of the case the plaintiff aliens' absence did not bar them from obtaining the same judicial review of the agency action by which they claimed to be injured under the immigration law as they would have been able to obtain if they were physically still in the United States.

The statement in the decision concerning the effect of the Administrative Procedure Act on the availability of judicial review under the Immigration and Nationality Act was made in the particular context that the Court was discussing the fact that, traditionally, court review had formerly been available to the alien directly concerned only in the form of habeas corpus proceedings. Now it is also available to him in the form of a review action under the Administrative Procedure Act.

This case did *not* involve the right of *other persons* than the alien directly affected to maintain a lawsuit challenging an immigration decision to admit or exclude such alien. Hence, we think, the discussion there is of no aid to appellants here.

(4) *Stark v. Wickard*, 321 U.S. 288 (1944) (App. Br., p. 40)

The entire Supreme Court agreed, on principle, that to have standing to sue, the complainant milk producers had to show the Congress had by statute conferred on them a statutory right protected by judicial remedies. But the members of the Court disagreed—on reading the statute—as to the congressional intent in the matter.

The majority of the Court declared (321 U.S. at 306):

* * * To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies. * * *

Closely examining the statutory provisions there involved, the majority found therein a congressional intent to confer upon the complainant milk producers a right, protected by judicial remedies, with respect to the disposition of the moneys in the "settlement fund".³⁶

Mr. Justice Frankfurter, dissenting,³⁷ also gave close examination to the provisions in the statute. But he determined therefrom that the Congress had *not* intended to confer any right protected by judicial remedies in the matter upon the complainant milk producers.

Mr. Justice Black, also dissenting, simply indicated that this Court had properly dismissed the action for want of jurisdiction. And he expressed the view that the judgment "should be affirmed for the reasons given" in the Court of Appeals opinion.³⁸ Examination of that opinion discloses this Court's decision likewise turned on this Court's judgment the Congress in enacting the Agricultural Marketing Agreement Act had *not* intended to confer upon the complainant milk producers any right protected by judicial remedies in the "settlement fund".³⁹

In the present case, we believe, there is no room for any disagreement as to the congressional intent. All indicia on the face of the Immigration and Nationality Act show the Congress meant to make immigration decisions with respect to the exclusion or admission of aliens as fully judicially nonreviewable as possible. The Congress specifically refrained in the statute from giving even the alien directly concerned an express right

³⁶ Two factors make *Stark v. Wickard* wholly distinguishable from appellants' case. *First*, the complainants there were being directly regulated by the governmental action they challenged; appellants here are not being regulated at all. *Second*, the complainants there had a definite property right involved in the "settlement fund"; appellants have no such interest here.

³⁷ 321 U.S. at 311.

³⁸ *Idem*.

³⁹ This Court's opinion is reported at 78 U.S. App. D.C. 44, 136 F. 2d 786 (1943).

to judicial review of an excluding decision.⁴⁰ And, as we have already discussed, the unusual historical development and background of the immigration law clearly bespeak the Congress' unwavering intent to foreclose court review of immigration decisions, to the fullest extent the Constitution and decided cases allow.

Hence, we consider *Stark v. Wickard*, on principle, to be a strong authority supporting our position here.⁴¹

We conclude, therefore, that appellants here lack legal right and do not have standing to sue on a claim of economic injury from competition for jobs by alien commuters.

And there is yet another reason why we believe appellants lack standing to sue, to which we now turn.

2. Appellants' claimed injury is too indirect and remote to give them standing to sue

Even assuming *arguendo* appellants possess a legal right in the matter (which we deny), we think they still cannot show here a sufficiently direct and proximate legal effect upon them personally from the Government's alleged non-exercise of its sovereign power to exclude individual alien commuters who,

⁴⁰ The provision making the agency decision "final" in an exclusion case appears in Section 236 of the Immigration and Nationality Act, 8 U.S.C. 1226. In contrast to the silence of Section 236 with respect to judicial review, the provision in Section 242 of the Act, 8 U.S.C. 1252, making the agency decision "final" in an expulsion case, does allude to judicial review. However, even there the reference is obviously only to judicial review at the instance of the alien directly affected. The statute is conspicuously silent as to conferring litigable rights upon any other person than the alien directly concerned. Nowhere in the Act is any such provision to be found. And the recently-enacted judicial-review provisions in the Act of September 26, 1961, 75 Stat. 651, 8 U.S.C. 1105a, likewise are conspicuously silent in this regard.

⁴¹ We do not overlook the other cases appellants cite in their brief, at pp. 36-40, to support their claim they have standing to sue. We think none of these other cases helps them here either.

Nor do we overlook appellants' assertion (Br. p. 42) that if they lack standing to sue the matter here may be judicially nonreviewable. The short answer is that appellants here are in exactly the same position as the complainants in the *Massachusetts v. Mellon*, *Alabama Power*, *Tennessee Electric Power*, *Lukens Steel*, *Kansas City Power & Light*, *Milk Producers* cases, *supra*. If they fail to present a justiciable "case or controversy" cognizable in the Federal courts, they simply cannot properly maintain suit.

appellants contend, are inadmissible to the United States under the immigration law.

To have standing to sue, a complainant must not only show a personal legal right. He must further show a substantial, direct and proximate legal injury to such right, caused or threatened by the action of which he complains. *Williams v. Riley*, 280 U.S. 78, 80 (1929); *Massachusetts (Frothingham) v. Mellon*, *supra*, 262 U.S. at 486-488; *National Coal Association v. Federal Power Commission*, 89 U.S. App. D.C. 135, 138, 191 F. 2d 462, 465 (1951). To constitute legal injury, the adverse effect upon the complainant's claimed legal right must be "traceable with reasonable certainty" directly to the action he challenges in the court proceedings. *United States Cane Sugar Refiners Assn. v. McNutt*, 138 F. 2d 116, 120 (2d Cir. 1943).

It seems patently clear here that the injury appellants claim is not directly and proximately produced by the Government's action permitting the long-established practice of allowing alien commuters to cross our land border into Texas to continue. If any injury is occurring to appellants, it is produced by the competition for jobs which occurs apart from and after the alien commuters' entry as "immigrants" has been effected.⁴² And, as we have noted, such competition for jobs as may exist is not limited to the alien commuters and appellants alone. It involves other workseekers in the community, including citizens and "immigrant" aliens not in the alien commuter class.

Accordingly, we submit, the impact upon appellants from the Government's non-exercise of its power to exclude allegedly inadmissible individual alien commuters is too indirect and remote to give them standing to sue under the circumstances here. The following case authorities provide analogous situations involving indirectly-interested

⁴² Appellants claim of injury is at best highly speculative. By definition, alien commuters have regular employment in the United States. Certainly, those alien commuters who have been employed steadily here over many years would appear not to be in current competition for jobs with appellants at all. Those alien commuters who work as maids (see par. 18 of the complaint) and in other non-union employment pursuits would also seem not to be in direct competition with appellants for jobs. And—so long as the Secretary of Labor makes no Section 212 (a) (14) certification—even new "immigrant" aliens may enter the United States from Mexico and compete economically with appellants for jobs.

third-parties, in which it was determined that the complainants' interests were too indirect and insufficient to give them standing to sue: *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305 (1945); *L. Singer and Sons v. United Pacific RR Co.*, 311 U.S. 295, 301, 304 (1940); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 254-255 (1930); *Federal Home Loan Bank Board v. Rowe*, *supra*, 109 U.S. App. D.C. at 141, 284 F. 2d at 275; *Union National Bank of Clarksburg v. Home Loan Bank Board*, *supra*, 98 U.S. App. D.C. at 206, 233 F. 2d at 697; *Allied-City Wide, Inc. v. Cole*, 97 U.S. App. 277, 278, 230 F. 2d 827, 828 (1956); *United Milk Producers of New Jersey v. Benson*, *supra*, 96 U.S. App. D.C. at 229, 225 F. 2d at 529.

For this reason, also, we contend appellants lack standing to sue.

B. Appellants' action otherwise fails to present a "case of controversy", since they seek an advisory opinion on an abstract question of law

We have observed that the allegations of appellants' complaint do not address themselves to the cases of any particular alien commuters whose daily reentry to pursue regular employment here in fact directly and substantially affects appellants' own personal job interests or the job interests of the class they purport to represent. And their complaint asserts appellants' interest only to be free from economic competition for jobs by alien commuters crossing into Texas. Yet, appellants seek to obtain a court opinion broadly declaring what shall be the law governing *in futuro* the entire practice of daily readmission of alien commuters. As we have pointed out, the opinion they seek would not be limited to redress of their alleged injury. They want the court to issue a broad order which would in effect control *all* alien commuters, even though the particular alien commuters were crossing the border elsewhere than into Texas, and were engaged in job pursuits in no wise interfering with appellants' own job pursuits.

It thus appears manifest that what appellants are here really seeking is an advisory opinion on an abstract question of law. The judicial power granted the courts by Art. III, Sec. 2, of the Constitution does not extend to giving such advisory opinions. It is limited to actual "cases or controversies." We think

appellants here fail to present an actual "case or controversy" in the constitutional sense of those terms. *International Longshoremen's, etc., Union v. Boyd*, 347 U.S. 222, 224 (1954); *United Public Workers, etc. v. Mitchell*, 330 U.S. 75, 89 (1947); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Coffman v. Breeze Corporations*, 323 U.S. 316, 324 (1945); *Aetna Life Insurance Co. v. Haworth*, 200 U.S. 227, 240 (1937).

Accordingly, for this reason too, we believe this action is properly dismissible for want of justiciability.

C. The litigation here essentially involves the making of a determination entirely committed to agency discretion and made judicially nonreviewable by statute

"Except when the Constitution requires it, judicial review of administrative action may be granted or withheld as the Congress chooses." *Estep v. United States*, 327 U.S. 114, 120 (1946). Where no vested legal right is involved, it is constitutionally permissible for the Congress to provide no judicial remedy. *Stark v. Wickard*, *supra*, 321 U.S. at 306; *United States v. Babcock*, 250 U.S. 328, 331 (1919); *Mario Mercado, etc. v. Benson*, 97 U.S. App. D.C. 298, 299-300, 231 F. 2d 251, 252-253 (1956).

And, particularly in an area wherein the Government has long exercised plenary powers inherent in national sovereignty, such as the immigration field, the Congress may constitutionally confer judicially-nonreviewable, discretionary authority upon the Executive in relation to matters not involving invasion of any vested legal rights. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-544 (1950); *Ludecke v. Watkins*, 335 U.S. 160, 162-164 (1948); *Citizens Protective League v. Clark*, 81 U.S. App. D.C. 116, 120, 155 F. 2d 290, 294, *cert. denied* 329 U.S. 787 (1946).

Furthermore, in *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 106 (1948), the Supreme Court held that, where the matter seems totally inappropriate for judicial review, either from its very nature, from the context of the Act, or from the "relation of judicial power to the subject-matter", the courts may determine it to be judicially

nonreviewable. And in *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958), the Supreme Court decided in relation to a matter which the Court declared to involve "nice issues of judgment and choice * * * which require the exercise of informed discretion", that the Congress there intended to leave the decision "to act or not to act" entirely to the "expertise of the agency burdened with the responsibility for decision."

Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, is simply declaratory of the existing law as to judicial non-reviewability. It opens with these two excepting clauses: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *." [Emphasis supplied.] This language leaves the matter as before. *Panama Canal Co. v. Grace Line, Inc.*, *supra*, 356 U.S. at 317; *Ludecke v. Watkins*, *supra*, 335 U.S. at 163, *United States v. Wiley's Cove Ranch*, 295 F.2d 436, 441 (8th Cir. 1961).

And it is clear that post-APA legislation can implicitly, as well as explicitly, express the Congress' intent to make an exception from application of the provisions of the Administrative Procedure Act. In other words, the Congress need not follow any particular word formula in making an express exception from the APA provisions. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Where the statute is unspecific, the determination whether the Congress meant entirely to commit the matter to agency discretion and to bar judicial review requires close examination of the textual context of the statutory provision in question, considered in light of the whole statutory scheme, purpose and history. *Heikkila v. Barber*, 345 U.S. 229, 232-233 (1953). *Cf. Estep v. United States*, *supra*, 327 U.S. at 120.

As we have developed, appellants lack any common-law or constitutional right to be free from competition for jobs. Their claim here involves the very subject matter dealt with by the Congress in Section 212(a)(14) of Immigration and Nationality Act.

That section vests jurisdiction in the Secretary of Labor to investigate and determine whether the entry of particular "immigrant" aliens to the United States for the purpose of

performing labor will be in injurious competition with unemployed American workers at the place to which such aliens are destined, or will adversely affect the wages and working conditions of similarly employed American workers. If so, then the section authorizes the Secretary, in his discretionary judgment, to make a certification of his conclusions in that regard to the Secretary of State and the Attorney General. And under the terms of the section, even where the Secretary of Labor so certifies, the Attorney General nonetheless has authority to admit the aliens in question to the United States if in his judgment their services are urgently needed here because of their special qualifications and give promise that they will be of substantial future benefit to the interests of the United States.

We think the immediate context of the Section 212(a)(14) provisions, the very nature of these agency determinations involved, and the whole statutory scheme of the Immigration and Nationality Act, clearly show that Congress here meant to commit the matter entirely to the discretion of the agencies concerned, and to wholly preclude by statute judicial review thereof in the courts.

The immediate contextual setting of the Section 212(a)(14) provisions shows an internal interrelation between the action of the Secretary of Labor and that of the Attorney General. It thus seems manifest that the Congress did not intend to have the procedure for certification by the Secretary of Labor operate independently of the Attorney General's mitigatory authority. Hence, it follows that the Congress did not mean to confer on American workers a personal right enforceable in the courts to be free of competition for jobs by entering aliens who are subject to its provisions. Moreover, the section appears in the statute simply as one among some thirty other grounds prescribed in Section 212(a) for the exclusion of individual aliens seeking entry to the United States. This also tends to support the conclusion that the Congress did not intend thereby to confer on any American workers a personal right enforceable by them through an independent suit in the courts.

The determination of the Secretary of Labor called for by Section 212(a)(14) patently requires extensive investigation

and application of the Department of Labor's expertise, and the exercise by the Secretary of Labor of a broad discretionary judgment, in a field totally unsuited to judicial inquiry. This factor strongly indicates that the Congress here meant to leave the decision as to when a Section 212(a)(14) certification should be made, entirely to the Department of Labor's special competence and "discretionary judgment" without intervention by the courts. *Schilling v. Rogers*, 363 U.S. 666, 674 (1960). Cf. *United States v. Wiley's Cove Ranch*, *supra*, 295 F. 2d at 440-443; *Federal Home Loan Bank Board v. Rowe*, *supra*, 109 U.S. App. D.C. at 143-145, 284 F. 2d at 277-279.

As for the whole statutory scheme, purpose and history: Immigration matters have through the years traditionally been considered to be "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations" and "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 583-589 (1952). The legislative history of the Immigration and Nationality Act discloses that the Congress deemed it well established by Supreme Court decisions that the Congress has plenary authority to deal with the admission of aliens as it sees fit.⁴³ And, as we have noted, the statutory "finality" provision that the Congress has long inserted in the immigration statutes has produced consistent recognition in the decided cases that the Congress has always intended to make immigra-

⁴³ See S. Rep. No. 1515, 81st Cong. 2d Sess. (1950), at pp. 336, 798. Enactment of the Immigration and Nationality Act in 1952 was preceded by extensive investigation and study by the Senate Judiciary Committee of the entire structure and operation of our immigration system. This comprehensive study culminated in S. Rep. No. 1515, and a draft omnibus bill, S. 3455, 81st Cong., 2d Sess. (1950). This bill provided the genesis for the Immigration and Nationality Act. See S. Rep. No. 1137, 82d Cong., 2d Sess., accompanying S. 2550, 82d Cong., 2d Sess., the Senate bill which, together with its House counterpart, H.R. 5678, came to be enacted as the Immigration and Nationality Act.

A similar expression of the legislative view appears in the House Report accompanying the bill which came to be enacted as the Immigration and Nationality Act. H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), at p. 6, reproduced in U.S. Code Cong. and Adm. News (1952), at p. 1654.

S. Rep. No. 1515 is hereinafter referred to as the "Omnibus Study Report." It is some 925 pages in length.

tion determinations "nonreviewable to the fullest extent possible under the Constitution." *Heikkila v. Barber, supra*, 345 U.S. at 234.

Accordingly, we believe, the District Court also lacked jurisdiction here because the present litigation essentially involves a determination which has been entirely committed to agency discretion, and made wholly judicially—nonreviewable by statute.

II. Assuming *arguendo* the case was within the District Court's cognizance, that Court properly—in the exercise of a sound judicial discretion—should have abstained from taking jurisdiction in equity or mandamus proceedings here.

A. The District Court possesses a sound judicial discretion to decline to entertain jurisdiction over a cause cognizable in equity or mandamus proceedings

"Jurisdiction" in the strict sense refers to the courts' power or authority to hear and decide a cause. The term "equity jurisdiction" refers to something different. It goes to the matter whether "in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity." *Atlas Life Insurance Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939).

It is well settled that the courts possess a judicial discretion to decline to entertain jurisdiction over a suit in equity for a declaratory judgment or injunctive relief. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962); *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961); *Martin v. Creasy*, 360 U.S. 219, 224–225 (1959); *Marcello v. Kennedy*, 114 U.S. App. D.C. 147, 150, 312 F. 2d 874, 877 (1962), *cert. denied*. 373 U.S. 933 (1963); *Davis v. Board of Parole, etc.*, 113 U.S. App. D.C. 194, 195, 306 F. 2d 801, 802 (1962). The courts possess a like judicial discretion to decline to entertain jurisdiction over an action in the nature of mandamus proceedings, which are governed by general equity principles. *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359 (1933). In both equity and mandamus proceedings, the courts, in the exercise of a sound judicial discretion, may decline to enforce or protect undoubted legal rights, and refuse

a remedy which "would work a public injury or embarrassment" or be "prejudicial to the public interest." *Id.*, 289 U.S. at 359-360. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest." *Virginia R. Co. v. System Federation, etc.*, 300 U.S. 515, 552 (1937). *Cf. Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

B. The District Court—in the exercise of a sound judicial discretion—properly should have abstained from entertaining jurisdiction

We believe that the District Court, if it had jurisdiction, should have on general equity principles and in furtherance of the public interest properly declined to take jurisdiction over this cause in either equity or mandamus proceedings.

1. Sensitive foreign affairs considerations are involved

As we have noted, the Secretary of State has certified in substance that the litigation here necessarily involves sensitive foreign affairs considerations. In his affidavit, he has stated that in his judgment an adverse decision here would have a seriously deleterious effect upon the prevailing "good neighbor" relations of the United States with Mexico, and possibly also with Canada and other nations in the Western Hemisphere. And it is further the Secretary's judgment that "the harm to United States-Mexican relations which would be the result of a termination of the commuter practice could seriously jeopardize the Alliance for Progress in Mexico, and thus in all Latin America."

It is well settled that the courts respect the foreign affairs determinations of the Executive. The making of judgments in the area of foreign relations is necessarily a matter of delicacy involving "large elements of prophecy." Such judgments are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.* *supra*, 333 U.S. at 111. An important factor that need be borne in mind is that the President is "the sole organ" of our Government in the field of our foreign rela-

tions. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936). And the acts of the Secretary of State in carrying on the Executive's constitutional foreign affairs function "are in legal contemplation the acts of the President." *Jones v. United States*, 137 U.S. 202, 217 (1890).

Judge Learned Hand, speaking of the courts' authority to review governmental actions, has wisely pointed out that such judicial power need not always be exercised. "* * * It is always a preliminary question how importunately the occasion demands an answer. It may be better to leave the issue to be worked out without authoritative [judicial] solution. * * *". *The Bill of Rights* (Oliver Wendell Holmes Lectures, 1958), at p. 15.

Furtherance of the public interest in continued "good neighbor" relations with Mexico, Canada and the other countries in the Western Hemisphere, and advancement of the great Inter-American program envisaged by the Alliance for Progress are weighty factors which clearly warranted the District Court in any event to have declined to entertain equity or mandamus jurisdiction here. And we think this conclusion is additionally warranted by the further consideration that appellants' attack here has been launched broadside against the entire long-standing alien commuter border accommodation along both the Canadian and Mexican borders.

2. The Congress has its own supervisory responsibility in this matter

In the *Kansas City Power and Light* case, this Court gave a most appropriate answer to a like problem. The Court there stated, 96 U.S. App. D.C. at 280, 225 F. 2d at 931:

* * * Congress has reserved for itself control over such * * * [Federal Public Power Program] * * * through the power of making annual appropriations for the executive departments affected, and by providing specifically that the contingent fund created by Section 5 of the Flood Control Act of 1944 may be expended only to the extent of annual appropriations for the purposes of the Act. The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations

sought by the defendants. It is not—under the controlling precedents—subject to review by this court.

In the immigration field the Congress not only controls the administration of the Immigration and Nationality Act by means of its review when making annual appropriations. Additionally, the Congress regularly maintains close supervision over the administration of the Act through the medium of the Joint Committee on Immigration and Nationality Policy (and otherwise). As stated in the Conference Report on the bill which came to be enacted as the Immigration and Nationality Act: “

* * * The House bill provided for a joint congressional committee to maintain surveillance over the administration and operation of the act and to study continuously matters affecting the immigration and nationality policy of the United States. * * * The conferees agreed to accept * * * [this] * * * provision.

The provision appears as Section 401 of the Act.⁴⁵ Subsections 401(d)–(f) provide:

(d) It shall be the function of the Committee to make a continuous study of (1) the administration of this Act, and its effect on the national security, the economy, and the social welfare of the United States, and (2) such conditions within or without the United States which in the opinion of the Committee might have any bearing on the immigration and nationality policy of the United States.

(e) The Committee shall make from time to time a report to the Senate and the House of Representatives concerning the results of its studies together with such recommendations as it may deem desirable.

(f) The Secretary of State and the Attorney General shall without delay submit to the Committee all regulations, instructions, and all other information as requested by the Committee relative to the administration

⁴⁵ H. Rep. No. 2096, 82d Cong. 2d Sess. (1952), at p. 129.

⁴⁶ 66 Stat. 274, 8 U.S.C. 1106.

of this Act; and the Secretary of State and the Attorney General shall consult with the Committee from time to time with respect to their activities under this Act.

Since it has traditionally been held down through the years, as we have noted, that immigration matters have been considered to be "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign affairs," such matters have been deemed "to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, *supra*, 342 U.S. at 588-589. It would be well here, then, for the courts to leave the matter to be worked out between the Executive and Legislative branches of the Government.

The Congress has recently had occasion to look into this matter. Both the decision of the District Court in the *Amalgamated* case, *supra*, and the action by the District Court in the present case, have been made of record in a Study Report.⁴⁶ The views of the Secretary of State expressed in his affidavit, and the continuing administrative recognition given the "immigrant" status of the alien commuters, have also been made of record in that Study Report.⁴⁷

The Congress, of course, has the capacity to make a proper adjustment in the national interest of the important conflicting interests at stake here. The courts, lacking any similar flexibility as the Congress possesses, should defer to legislative resolution of the matter.

Accordingly, we submit, the District Court properly—in the exercise of a sound judicial discretion—should, if it had jurisdiction, have abstained from entertaining jurisdiction over this cause in equity on mandamus proceedings.

III. The long-standing administrative application of the immigration law, recognizing alien commuters as entitled to continue enjoying "immigrant" status, so long as such status does not change, is correct as a matter of law

Assuming that the Court reaches the merits here, we maintain, this Court should properly conclude that the long-standing administrative application of the immigration law,

⁴⁶ H. Comm. on Judiciary, Subcommittee No. 1, Study of Population and Immigration Problems, Administrative Presentations (III) (1963), at pp. 156-160.

⁴⁷ *Id.*, at pp. 161-184.

recognizing alien commuters as entitled to continue enjoying "immigrant" status, so long as such status does not change, is correct as a matter of law.

This conclusion essentially turns upon the technical, word-of-art, meaning⁴ of the term "immigrant", as it has long been used in the immigration law—both under the prior statute and, currently, under the Immigration and Nationality Act. Proper understanding of this term is critical to decision on the merits here.

The theory on which appellants rely here—as we understand it—is that in enacting the Immigration and Nationality Act in 1952 the Congress tossed out the long-standing, word-of-art, meaning of the term "immigrant" for purposes of the immigration law, settled by the famous decision of the Supreme Court in *Karnuth v. United States ex rel. Albro*, 279 U.S. 231 (1929).⁴

⁴ Various terms used in the immigration statute are technical words of art. E.g., the term "entry". See *Barber v. Gonzales*, 347 U.S. 637, 641 (1954); *Bonetti v. Rogers*, 356 U.S. 691, 698 (1958). An alien physically in the United States who is here under parole status is regarded in contemplation of law as being physically outside the United States. *Long May Ma v. Barber*, 357 U.S. 185, 188-190 (1958). But an alien physically outside the United States who has the status of a lawfully admitted "immigrant" is regarded as being physically in the United States for substantive due process of law purposes. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). And each reentry by an alien having the status of a lawfully admitted "immigrant" is a new "entry" within the meaning of the immigration law. *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425 (1938). See *Shaughnessy v. United States ex rel. Mesel*, 345 U.S. 206, 213 (1953).

⁵ The precise holding and impact of this leading case are discussed *infra*. The case is hereinafter referred to as "the *Albro* decision" or simply "*Albro*." It is indeed ironical that in the present litigation representatives of American labor are seeking to throw out the technical meaning of the term "immigrant", and to adopt the ordinary meaning of that word, for purposes of the immigration law. For, in *Albro*, the Supreme Court took note that the immigration statute made its own definition of the term; that the Congress had purposely given the term a special statutory meaning; that "the history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor;" that one of the evils sought to be corrected was that of "immigrants coming to the United States not so much for permanent residence as to seek temporary profitable employment;" and that "in view of this definite policy, it cannot be supposed that Congress intended, by admitting aliens temporarily for business, to permit their coming to labor for hire in competition with American workingmen, whose protection it was one of the main purposes of the legislation to secure." 279 U.S. at 243-244.

They contend in substance that the Congress instead adopted the ordinary meaning of the term "immigrant"—which the *Albro* decision had specifically rejected. It is our position that the Immigration and Nationality Act currently carries forward unchanged the word-of-art meaning of the term "immigrant" for purposes of the immigration law.

A. The alien commuter border accommodation involves a long-standing, contemporaneously-made, practical application of both the Immigration Act of 1924 and the Immigration and Nationality Act

For clarity of understanding,⁵⁰ the Court needs to know the historical background of the alien commuters being deemed to be "immigrants", and the evolution of the border accommodation with respect to them. This historical background shows clearly that the Court is here concerned with a long-standing, contemporaneously-made, practical application of the statute by the Administrators charged with the duty of making its parts work efficiently and smoothly while yet new.

The alien commuter border accommodation has its roots, as we have indicated, deep in the traditional "good neighbor" foreign policy of the United States. Prior to 1921, there were no numerical limitations imposed by statute upon the number of aliens who could come to the United States seeking work. Thus, for many years prior to 1924 aliens in Canada or Mexico could enter the United States for work purposes without hindrance, provided they did not run afoul of the alien contract labor provisions in the law.⁵¹

⁵⁰ See Gordon and Rosenfield, *Immigration Law and Procedure*, § 1.1: "The immigration laws of the United States are detailed and complex. Obviously this body of law did not emerge overnight. It is the product of a long history, and an understanding of this background often is helpful in interpreting and applying the law of today."

⁵¹ For present purposes, we ignore the other excluding provisions in the then-existing immigration law. The original law barring alien contract laborers was the Act of February 26, 1885, 23 Stat. 332. See *Lees v. United States*, 150 U.S. 476 (1893). An early exception was carved out for aliens whose work was predominantly mental. *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892). The provision was carried forward in succeeding immigration statutes. It finally was incorporated into Section 3(h) of the Immigration Act of 1917, 39 Stat. 875, former 8 U.S.C. 136(h). And the 1917 Act provisions remained in effect until repealed by the Immigration and Nationality Act, Title IV, § 403(a), 66 Stat. 279.

The First Immigration Quota Act, a temporary measure, was enacted in 1921. It introduced numerical limitations on immigration, but these restrictions did not apply to aliens who had been in Canada or Mexico for one year or more.⁵² In 1922, the period of exemption for aliens who had been in Canada or Mexico was raised to five years.⁵³ These limitations did not interfere with the work pursuits in the United States of natives or long-time residents of Canada and Mexico. This temporary quota legislation expired in 1924.

The Immigration Act of 1924⁵⁴ for the first time in our history enacted into law permanent "immigrant" quota limitations. It allotted annual quotas by countries of origin. Two exceptions were made of signal importance here: *First*, aliens born in Canada or Mexico (or in any other independent country of the Western Hemisphere) were exempted from the "immigrant" quota restrictions imposed by the Act.⁵⁵ *Second*, aliens previously lawfully admitted to the United States as "immigrants," returning after a temporary departure, were likewise excepted from any quota restrictions.⁵⁶

The 1924 Act gave a technical meaning to the term "immigrant". It expressly defined⁵⁷ the term to mean "any alien departing from any place outside the United States destined for the United States," unless within certain specified "non-immigrant" categories. One of the specified "nonimmigrant" categories was "an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."⁵⁸

⁵² Section 2(a) (7) of the Act of May 19, 1921, 42 Stat. 5.

⁵³ Section 2 of the Act of May 11, 1922, 42 Stat. 540.

⁵⁴ Act of May 26, 1924, 43 Stat. 153, *et seq.*, former 8 U.S.C. 201, *et seq.*; hereinafter referred to as "the 1924 Act."

⁵⁵ Sec. 4(c) of the 1924 Act, 43 Stat. 155, former 8 U.S.C. 204(c). This provision has been carried forward into current law. Section 101(a) (27) (C) of the Immigration and Nationality Act, 66 Stat. 168, 8 U.S.C. 1101(a) (27) (C).

⁵⁶ Sec. 4(b) of the 1924 Act, 43 Stat. 155, former 8 U.S.C. 204(b). This provision has likewise been carried forward into current law. Section 101(a) (27) (B) of the Immigration and Nationality Act, 66 Stat. 169, 8 U.S.C. 1101(a) (27) (B).

⁵⁷ Section 3 of the Act, 43 Stat. 154, former 8 U.S.C. 203. The 1924 Act's technical definition of the term "immigrant" has been carried forward in substantially unchanged form into current law. Section 101(a) (15) of the Immigration and Nationality Act, 66 Stat. 167, 8 U.S.C. 1101(a) (15).

⁵⁸ Section 3(2) of the Act, 43 Stat. 154, former 8 U.S.C. 203(2).

By operation of the technical, word-of-art, definition given the term "immigrant", it was immaterial whether an entering alien was coming here with the intention of establishing his permanent residence in the United States, or only temporarily. *Irrespective of his intention as to length of stay*, if he did not fall within one of the specifically enumerated categories of "non-immigrant" aliens, he was classifiable as an "immigrant."

When the 1924 Act first went into effect, the Immigration authorities initially considered alien commuters to fall within the "nonimmigrant" category of aliens visiting the United States "temporarily for business." Thus, alien commuters were at first permitted uninhibited entry, as theretofore, classified as "nonimmigrant" visitors "for business." But on April 1, 1927 the Immigration authorities placed in effect an interpretation of the statute, incorporated into their General Order 86, under which all aliens entering the United States to work or to seek employment here were held *not* to be entering "for business"; rather, they were deemed to be "immigrants" within the meaning of the 1924 Act.

This ruling made alien commuters subject for the first time to the documentary entry requirements prescribed for "immigrants" in the 1924 Act. This meant that they had to apply to an American consular officer abroad for an "immigrant" visa, and present such visa when seeking admission to the United States. The alien commuters' arming themselves with the necessary "immigrant" visa qualified them under the law for both the privilege of working in the United States and the privilege of establishing their permanent residence here. But—and this is the critical point here—their securing "immigrant" visas did *not* require them (or any other aliens in the "immigrant" class for that matter) to intend to establish or in fact establish their permanent residence in the United States.

The interpretation of the law by the Immigration authorities incorporated into their General Order 86 was promptly challenged in the courts. As we have discussed, the Supreme Court in *Albro* sustained the Administrators' reading of the statute. The Court ruled as follows (279 U.S. at 242-244):

* * * In construing § 3(2) of the Immigration Act, we are not concerned with the ordinary definition of the term "immigrant" as one who comes for permanent residence. The act makes its own definition * * *. The term * * * includes every alien coming to this country *either to reside permanently or for temporary purposes*, unless he can bring himself within one of the exceptions. The only exception pertinent to the present case is the second, * * * namely, an alien visiting the United States "temporarily for business or pleasure." The contention is that respondents were temporary visitors for business; and the case is, therefore, narrowed to the simple inquiry whether the word "business", as used in the statute includes ordinary work for hire. * * * The true sense in which the word was here employed will be best ascertained by considering the policy, necessity and causes which induced the enactment. * * *.

The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. * * *

In view of this definite policy, it cannot be supposed that Congress intended, by admitting aliens temporarily for business, to permit their coming to labor for hire in competition with American workmen, whose protection it was one of the main purposes of the legislation to secure.

The word "business", as here used, must be limited in application to intercourse of a commercial character; and we hold that the departmental regulation [General Order 86], to the effect that temporary visits for the purpose of performing labor for hire are not within the purview of § 3(2) of the Act, is in accordance with the congressional intent. [Emphasis and bracketed material supplied.]

The aliens involved in *Albro* were born in Europe. Under the 1924 Act they were subject to the "immigrant" quota restrictions. As a result of *Albro*, all aliens who were (like the plaintiffs there) required by the 1924 Act to obtain quota "immigrant" visas, were precluded from circumventing the congressional intent in establishing the quota restrictions. *Albro* settled the principle, essential to proper administration of the quota limitations imposed by the 1924 Act, that all aliens seeking to enter the United States to work had to procure "immigrant" visas before they could be lawfully employed here.

But *Albro* did not provide any serious obstacle to entry by the bulk of alien commuters. Most of them were natives of Canada or Mexico. Hence, they could obtain nonquota "immigrant" visas without difficulty. As noted, they were free from the quota limitations of the 1924 Act. And, as was true of all "immigrants", they did not have to intend to establish permanent residence in the United States in order to be entitled to secure their "immigrant" visas.

Thus, immediately following *Albro*, the Immigration authorities were faced with a practical problem of considerable proportions in administering the 1924 Act with respect to alien commuters: Theoretically, the Immigration authorities could have required the alien commuters to procure "immigrant" visas each day, and present them on applying for re-entry. But this would have directly conflicted with the traditional "good neighbor" relations prevailing along the borders. And it would not have made good sense in light of the congressional policy expressed in the 1924 Act, exempting aliens born in Canada or Mexico from any "immigrant" quota restrictions. The 1924 Act's quota provisions were really aimed at the "immigrants" from the countries subjected to the quota restrictions, not at the natives of the independent countries of the Western Hemisphere who were exempted from any quotas.

The Administrators found that the 1924 Act itself provided the means to effect a practical solution to this alien commuter border-crossing problem. Included in the basic scheme of the Act was the following documentary procedure for the re-entry of "immigrants": Once an alien (even though originally subject to the quota restrictions) was admitted to the United

States as an "immigrant" with a proper "immigrant" visa he could thereafter make temporary departures from the country and be readmitted on his return, exempt from the Act's quota restrictions. Such an "immigrant" could obtain a re-entry permit⁵⁹ before leaving the United States. Or he could obtain a nonquota "immigrant" visa⁶⁰ (even though originally a quota "immigrant") from an American consular officer abroad, and present it on his return. Moreover, the Immigration authorities were given power⁶¹ "in such classes of cases and under such conditions as may be by regulations prescribed" to waive the visa documentary requirements of the Act and readmit to the United States "immigrants" originally legally admitted to the United States "who depart[ed] therefrom temporarily."

Acting under this statutory authority, the Immigration authorities—in order generally to facilitate travel across the Canadian and Mexican borders, and particularly to avoid delays and embarrassments in making inspections at the heavily-travelled land border ports—provided by regulation for the issuance of border-crossing identification cards to "aliens and citizens who, residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits."⁶²

* * *

This provision was later revised, by adding: "These cards shall be issued to aliens of both the 'immigrant' and 'non-immigrant' class."⁶³ * * *

The border-crossing identification cards served in lieu of "immigrant" visas or re-entry permits⁶⁴ for the returning "immigrants."

⁵⁹ Under Section 10 of the Act, 43 Stat. 158, former 8 U.S.C. 210.

⁶⁰ Under Section 4(b) of the Act, 43 Stat. 155, former 8 U.S.C. 204(b).

⁶¹ Section 13(b) of the Act, 43 Stat. 161, former 8 U.S.C. 213(b).

⁶² Rule 3, Subd. Q. Par. 1, Immigration Rules of March 1, 1927 (GPO 1927).

⁶³ Rule 3, Subd. Q. Par. 1, Immigration Rules of January 1, 1930 (GPO 1935). Rule 3 also provided:

"Aliens entering the United States to engage in existing employment or to seek employment in this country and who desire to continue to reside in foreign contiguous territory will be considered as aliens of the immigrant class."

This provision was carried forward in 8 C.F.R. 3.6 (1st ed., 1938), and thereafter in 8 C.F.R. 110.6 (1947 Supp.) and in 8 C.F.R. 110.6 (1949 ed.).

⁶⁴ The established administrative practice later received direct statutory sanction in Section 30 of the Alien Registration Act of 1940, 54 Stat. 673, former 8 U.S.C. 451.

The practical solution to the alien commuter border-crossing problem was thus simplified. After an alien commuter obtained an "immigrant" visa and effected lawful entry as an "immigrant", he was thereafter regarded—when he made his daily departure to his abode in neighboring Canada or Mexico—to be making a temporary departure from the United States. And, on his daily return to the United States, he was deemed to be a previously lawfully-admitted "immigrant"—which he was—returning after a temporary departure. Accordingly, the alien commuters, after they were initially lawfully admitted as "immigrants", were given border-crossing identification cards authorizing their daily re-entry as returning legally-admitted "immigrants."⁶⁵

In sum, then, the long-established border accommodation with respect to alien commuters⁶⁶ has been as follows: Prior

⁶⁵ After enactment of the Alien Registration Act of 1940, the immigration regulations specifically authorized the use of a border-crossing identification card in lieu of an immigrant visa by a returning lawfully-admitted "immigrant." 8 C.F.R. (1940 Supp.) 36.4 II(c). In 1941, the regulations referred to this as the resident alien's border-crossing identification card. 8 C.F.R. (1941 Supp.) 110.54, *et seq.* Among those specially exempted from payment of headtax were the alien commuters, defined as "aliens who, without taking up residence in the United States, habitually cross and recross the land boundaries and who hold a Resident Aliens' Border Crossing Identification Card." 8 C.F.R. (1941 Supp.) 105.3(h). These regulations were later recodified as 8 C.F.R. 166.1, *et seq.* See 8 C.F.R. (1944 Supp.). In 1952, the regulations were modified so as to provide that the "immigrant" alien's alien registration receipt card issued after September 10, 1946 would constitute a resident alien's border-crossing identification card. 17 F.R. 4921.

⁶⁶ The historical background we have set forth here with respect to the established alien commuter border accommodation is reflected in two published precedent Immigration and Nationality decisions. The first, a decision by the Immigration and Naturalization Service, Matter of L—, is reported at 4 I. & N. Decisions 454 (1951). It involved application of the 1924 Act to alien commuters, and was concerned with the case of a Canadian-born alien. The decision is accompanied by an "Editor's Note" which refers to an unreported decision by the Board of Immigration Appeals, Matter of F—, December 30, 1946, approved by the Attorney General January 3, 1947. In that decision, the Board stated: "Our policy regarding commuters may be considered part of reciprocal arrangements with Canada and Mexico." *And the Board went on to cite statistics as to United States citizens and legal residents here, commuting to work in Canada and Mexico, as well as those commuting to work here but living there.*

The second, a decision by the Board of Immigration Appeals, Matter of H— O—, is reported at 5 I. & N. Decisions 716, 717-718 (1954). It in-

to 1927 the traditional practice of alien commuters crossing our land borders, commuting daily between their abodes in neighboring Canada or Mexico and their places of regular employment in the United States, went unquestioned and uninhibited. After 1927, and on up to the present time, the alien commuters, once having been lawfully admitted as "immigrants", have been deemed to be entitled to continue enjoying "immigrant" status in this country, so long as they (1) did not become subject to deportation for violation of one of the deportation provisions in the immigration law, or (2) did not cease commuting between their adjacent abodes in Canada or Mexico and their places of regular employment in the United States.

B. In drafting the Immigration and Nationality Act, the Congress was well aware the Immigration authorities had through the years recognized alien commuters as having lawfully-admitted "immigrant" status, and regarded their daily commuting departures to be temporary absences not affecting their established "immigrant" status in the United States; and the Congress expressed no dissatisfaction with the practice

As we have noted, the Immigration and Nationality Act codified the pre-existing immigration status into a single, unified whole. That the Congress was well aware the Immigration authorities had through the years recognized alien commuters as continuing to be entitled to the *status* of lawfully admitted "immigrants", and regarded their daily commuting departures to be temporary absences not affecting their established "immigrant" status, clearly appears from the legislative history.

The Omnibus Study Report, S. Rep. No. 1515, stated the following in discussing the "border crossers" (at pp. 535-536):

involved application of the immigration law to alien commuters after enactment of the Immigration and Nationality Act in 1952. The Board there determined that the long-existing border accommodation with respect to alien commuters has not been disturbed in any way by the 1952 Act. Rather, the Board concluded, the 1952 Act evinces implicit approval of the practice by Congress since: (a) the legislative history reveals the Congress' full awareness of this border accommodation and discloses no congressional dissatisfaction with the practice; and (b) the 1952 Act's definitions carry forward essentially unchanged the technical meanings given under the 1924 Act to the terms "immigrant", "lawfully admitted for permanent residence", and "border-crossing identification card", insofar as they affect the alien commuters. The Board specifically noted that, while the 1952 Act has added a new category of "nonimmigrant" workers, coming here temporarily to perform temporary services, that new "nonimmigrant" category does not encompass alien commuters.

In order to facilitate traffic on the Canadian and Mexican borders, and ease, to some extent, the burden on the immigrant inspectors at the ports of entry and departure, two types of border-crossing identification cards have been instituted under the authority of section 30 of the Alien Registration Act of 1940: One for resident aliens and the other for nonresident aliens.

A resident alien's border-crossing identification card is a document which may be issued to (1) a lawfully resident alien who wishes to visit Canada or Mexico for a period or periods of less than 6 months, which may be presented by him as prima facie evidence that he is returning to a lawful permanent residence, and (2) an alien who has been admitted for lawful permanent residence but who resides in foreign contiguous territory and is employed in the United States, the so-called commuter.

* * * * *

The following border crossers, in the absence of a valid visa or re-entry permit, must have in their possession an alien's border-crossing identification card: (1) Lawfully resident aliens of the United States who wish to visit in Canada or Mexico for a period or periods of less than 6 months, (2) *an alien lawfully admitted to the United States for permanent residence but who resides in contiguous territory of Canada or Mexico and is employed in the United States*; or (3) citizens of Mexico who wish to enter the United States for a period or periods of not more than 29 days. [Emphasis supplied.]

* * * * *

In discussing the various "nonimmigrant" classes of aliens, the Omnibus Study Report conversely stated (at p. 616):

* * * [Nonimmigrant a]liens in Canada or Mexico continually cross our borders. To facilitate inspection at ports of entry provision is made for them to apply at American consulates for border-crossing cards. * * *

Cards [as nonimmigrant border crossers] will not be

issued to aliens who appear to the consul to be immigrants rather than nonimmigrants, to aliens who intend to cross the border and remain more than 29 days, or to *aliens who have been admitted into the United States for permanent residence. Aliens in the last category who cross the borders frequently are known as commuters and are not nonimmigrants and they must apply for resident alien's border-crossing cards at the appropriate office of the Immigration and Naturalization Service.* [Emphasis and bracketed material supplied.]

As these excerpts from the Omnibus Study Report make clear: The Congress clearly understood the Immigration authorities recognized alien commuters to be entitled to the status of lawfully admitted "immigrants". And the Congress expressed no dissatisfaction "whatever with respect to the established administrative practice of issuing border-crossing identification cards to alien commuters identifying them as entitled to the status of lawfully admitted "immigrants". Nor is there any indication whatsoever in any other part of the legislative history that the Congress was in any way dissatisfied with the administrative recognition given the alien commuters as continuing to be entitled to "immigrant" status, and as not interrupting that status when they make their daily commuting departures.

C. The Immigration and Nationality Act carries forward into current law the prior recognition given the alien commuters as being entitled to lawfully admitted "immigrant" status, so long as they continue to maintain that status

The Immigration and Nationality Act carries forward essentially unchanged the technical applications given under the

"In contrast to this, the Report was quite critical of the loose issuance of border-crossing identification cards to "nonimmigrants". In that connection, the Report observed (at p. 536) :

"It has been established that numerous holders of nonresident border-crossing cards have violated their status and remained in the United States, and in view of the tremendous numbers of persons who cross our borders each year, violations have become a serious problem. During the fiscal year ending June 30, 1948, there were 38,892,545 crossings of our land borders of Canada and Mexico by aliens. The number has practically doubled since the prewar period. * * *."

We shall have occasion to refer to this criticism *infra*.

1924 Act to the terms "immigrant", "lawfully admitted for permanent residence", returning "immigrants", and "border-crossing identification card."

First, under both statutes the term "immigrant" means every alien coming to the United States except an alien within one of the specified "nonimmigrant" categories.⁶⁸ To establish this, we hereinafter reproduce in parallel columns the corresponding material definition provisions appearing in the two statutes:

*Immigration Act of 1924*⁶⁹

* * * When used in this Act the term "immigrant" means any alien coming from any place outside the United States except * * * [the enumerated categories of "nonimmigrants"] * * *

*Immigration and Nationality Act*⁷⁰

* * * As used in this Act—

* * * (13) The term "entry" means any coming of an alien into the United States, from a foreign port or place * * *

* * * (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—* * * [the enumerated categories of "nonimmigrants"] * * *

In accord is the statement in 3 Am. Jur. 2d (1962), *Aliens and Citizens*, § 48, at p. 899. There, citing both the current statutory provision, 8 U.S.C. 1101(a)(15) of the Immigration and Nationality Act, and the *Albro* decision, the authors of the

⁶⁸ The term "nonimmigrant" should not be confused with the term non-quota "immigrant". As noted above: Every arriving alien who does not come within any one of the specified "nonimmigrant" categories is an "immigrant." "Immigrants" who are not subject to the quota limitations are non-quota "immigrants". "Immigrants" who are subject to the quota restrictions are quota "immigrants".

⁶⁹ Sec. 3 of the Immigration Act of 1924, 43 Stat. 154, former 8 U.S.C. 203.

⁷⁰ Sec. 101(a) (13) and 15 of the Immigration and Nationality Act of 1952, 66 Stat. 167, 8 U.S.C. 1101(a) (13) & (15).

article in that encyclopedia state the current law to be as follows:

The ordinary definition of immigration is the coming of foreigners into the country for purposes of permanent residence. * * * [But t]he term "immigrant", as defined in the Immigration and Nationality Act, means every alien except an alien who is within one of the classes of nonimmigrant aliens specified in the statute. *The term thus includes every alien coming to this country, either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions.* [Emphasis and bracketed material supplied.]

Also in accord is the immigration text by Gordon and Rosenfield, *Immigration Law and Procedure*, § 2.1b, at p. 99, where the following statement (also citing the current statutory provision, 8 U.S.C. 1101(a)(15) of the 1952 Act, and the *Albro* decision) appears:

* * * An immigrant ordinarily is one who seeks to enter the United States for permanent residence, and who eventually may be naturalized as an American citizen. However, by definition an immigrant includes "every alien" who cannot establish that he is a non-immigrant. The chief significance of this negative definition is that a person who asks to enter the United States for an ostensibly temporary purpose may be regarded as an immigrant if he does not satisfactorily show that he is a nonimmigrant. * * *

Second, under *both* statutes the terms "lawfully admitted for permanent residence" and returning "immigrant" likewise carry an identical meaning. We have already noted the status an "immigrant" alien lawfully admitted under the 1924 Act enjoyed in the United States. We shall show the status is the same under the Immigration and Nationality Act.

Since, as we have established, the term "immigrant" has the same meaning under the Immigration and Nationality Act as it had under the 1924 Act, it follows that lawful admission under an "immigrant" visa currently gives an alien a recognized

status in the United States entitling him to the privilege of working in the United States without restriction, as well as the privilege of remaining indefinitely or establishing permanent residence in this country. But having this status does not compel the "immigrant" to intend to establish, or in fact establish, permanent residence in the United States.⁷¹

Under the 1924 Act, this recognized status of the "immigrant" was referred to, in a shorthand way, as the status of "having been lawfully admitted for permanent residence." Section 4(b) of the 1924 Act⁷² classified as a nonquota "immigrant" an alien within the following classification—

an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad.

As we have discussed, this statutory provision entitled the "immigrant" alien who had been "lawfully admitted for permanent residence" to re-enter the United States following a temporary

⁷¹ But if the lawfully admitted "immigrant" does not avail himself of the privilege of establishing permanent residence here, he cannot proceed to be naturalized as a United States citizen. The general naturalization provisions in the Immigration and Nationality Act require that the applicant for naturalization shall have "resided continuously after being lawfully admitted for permanent residence within the United States" for a specified period of time of either five or three years. Sections 316 and 319 of the Act, 8 U.S.C. 1427 and 1430. It is in relation to the residence requirement in those naturalization provisions that the statutory definition of the term "residence" in Section 101(a)(33) of the Act, 8 U.S.C. 1101(a)(33), operates to require that the "immigrant" alien shall have established his "principal, actual dwelling place in fact" in this country for the required five or three-year period after lawful admission under an "immigrant" visa. The same rule applied under the previous naturalization statute. *Petition of Correa*, 79 F. Supp. 265, 267, 268 (W.D. Texas 1948).

See H. Rep. No. 1365, 82d Cong. 2d Sess. (1952), U.S. Code Cong. and Adm. News, at p. 1684; S. Rep. No. 1137, 82d Cong. 2d Sess. (1952), at p. 4. Both reports make it clear that the term "residence" in Section 101(a)(33) of the 1952 Act was designed to be "a codification of judicial constructions of the term * * * as expressed by the Supreme Court of the United States in *Savorgnan v. United States* (338 U.S. 491, 505 (1950))." *Savorgnan* was a nationality case which arose under the Nationality Act of 1940, 54 Stat. 1137, *et seq.*, former 8 U.S.C. 501, *et seq.*

⁷² 43 Stat. 155, former 8 U.S.C. 204. The privilege of re-entering as a Section 4(b) nonquota "immigrant" was of particular advantage to an "immigrant" who, because of his birth in a quota country, had originally had to secure a quota "immigrant" visa. On subsequent entries, he could enter without being subject to the quota restriction.

departure in the capacity of returning "immigrant". See *United States ex rel. Stapf v. Corsi*, 287 U.S. 129, 133 (1932); *International Mercantile Marine Co. v. Elting*, 67 F. 2d 886, 887 (2d Cir. 1933); *United States ex rel. Georgas v. Day*, 43 F. 2d 917, 918-919 (2d Cir. 1930).

The Omnibus Study Report, S. Rep. No. 1515 (at p. 590), recommended that this nonquota "immigrant" category of "an immigrant previously lawfully admitted to the United States returning from a temporary visit abroad" be carried forward into the codification without change.

And Section 101(a)(27)(B) of the Immigration and Nationality Act³³ carries this nonquota "immigrant" classification forward into current law without change.³⁴ It describes the category as follows:

* * * an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad * * *

Section 101(a)(20) of the Immigration and Nationality Act defines the term "lawfully admitted for permanent residence" to mean:

* * * *the status* of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. [Emphasis supplied.]

This carries forward into current law unimpaired the technical meaning given the term "lawfully admitted for permanent residence" under the prior law. Comparison of *the status* accorded alien commuters under the 1924 Act with this definition makes it manifest that the Congress so carefully worded the

³³ 66 Stat. 166, 8 U.S.C. 1101(a)(27)(b).

³⁴ Appellants demonstrate total confusion on this point. App. Br., pp. 26, 31. They entirely miss the point that the phrase "for permanent residence" which they italicize was read into Section 4(b) of the 1924 Act by the administrative practice and judicial decisions. And, without any logical warrant, they also stress the fact that the word "previously" appeared in Section 4(b) of the 1924 Act, whereas it is absent from the phraseology of Section 101(a)(27)(B) of the Immigration and Nationality Act. Obviously, one cannot *return* from a temporary visit abroad without having been *previously* in the United States. Undoubtedly, the word "previously" was dropped as unnecessary phraseology in drafting Section 101(a)(27)(B).

technical definition in Section 10(a)(20) to refer to a "status" precisely for the purpose of bringing the alien commuter border accommodation within its ambit.

Both the House and Senate Reports²³ accompanying the bills which came to be enacted (after conference) as the Immigration and Nationality Act in 1952, contain the following identical statement²⁴ with respect to this definition:

Section 101(a)(20) *defines precisely* the term "lawfully admitted for permanent residence." *This term has especial significance because of its application to numerous provisions of the bill.* [Emphasis supplied.]

Appellants manifest confusion as to the use of the word "precisely" in this Committee statement. App. Br., p. 32. They do not want to accept this as the *precise* technical meaning the Congress—carrying forward the prior law—assigned the *status* of a lawfully admitted "immigrant" in the United States. Instead, they would want to re-define the phrase "lawfully admitted for permanent residence" in terms of two other definitions appearing in the Act. They refer to the separate definition of the term "permanent" appearing in Section 101(a)(31) of the Act, and the separate definition of the term "residence" appearing in Section 101(a)(33) of the Act.

We believe appellants thus take impermissible liberties, contrary both to the letter of the statute and the expressed intent of Congress. And, we respectfully submit, Judge Youngdahl fell into the same basic error in *Amalgamated Meat Cutters, etc. v. Rogers, supra*, 186 F. Supp. at 118, as do appellants here.

In sum, then: Under the current statute, as well as under the pre-existing law, the alien "lawfully admitted for permanent residence" under an "immigrant" visa, thus acquires "the status of having been lawfully accorded the privilege of residing in the United States as an immigrant in accordance with the im-

²³ H. Rep. No. 1365 and S. Rep. No. 1137, 82d Cong. 2d Sess. (1952). The House Report is reproduced in U.S. Code Cong. and Adm. News (1952), at pp. 1653-1756.

²⁴ H. Rep. 1365, U.S. Code Cong. and Adm. News (1952), at p. 1684; S. Rep. No. 1137, at p. 4. In the Senate version of the Act, this definition appeared as Section 101(a)(19). Hence, S. Rep. No. 1137 refers to it under that designation.

migration laws." He may, but is not compelled to, take advantage of the privilege to establish his permanent residence in this country.

This brings us to consideration of the meaning of the added phrase "such status not having changed" appearing in Section 101(a)(20) of the Immigration and Nationality Act. Again, this necessitates reference to the established application of the law under the pre-existing immigration statutes.

We have noted that under the 1924 Act an alien lawfully admitted as an "immigrant" under an "immigrant" visa thus initially established his lawful presence in the United States for *all* immigration purposes. He thereby qualified for the privilege of performing work of a continuing or permanent nature in this country. And he thereby qualified for the privilege of residing here indefinitely or permanently, if he chose to do so.

But, under the pre-existing law, these privileges were subject to forfeiture if the lawfully admitted "immigrant" alien thereafter became deportable from the United States. Congress specified in the immigration law a number of deportation grounds for causes arising subsequent to entry. Thus, for example, the lawfully admitted "immigrant" alien might become deportable for conviction after entry of a crime involving moral turpitude."

If the lawfully admitted "immigrant" alien became deportable, his status of being entitled to these privileges was deemed to have become changed by operation of the law. He then ceased to be regarded as entitled to the privilege of remaining here any longer in a lawful "immigrant" status.

This, then, is the meaning of the added phrase "such status not having changed."

To recapitulate: The foregoing discussion should make clear that in the technical immigration sense the term "lawfully admitted for permanent residence" was well understood under the pre-existing immigration law to mean *precisely*—

" See, e.g., *United States ex rel. Claussen v. Day*, 279 U.S. 398, 400-401 (1929); *United States ex rel. Karpay v. Uhl*, 70 F. 2d 792 (2d Cir.), *cert. denied* 293 U.S. 573 (1934).

the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration law, such status not having changed.

And it should further be clear that Section 101(a)(20) of the Immigration and Nationality Act of 1952 expressly codifies—and does not make any change in—the commonly understood, technical meaning of the term “lawfully admitted for permanent residence” under the pre-existing immigration law.

Third, in enacting the Immigration and Nationality Act, the Congress carried forward the prior recognition given the border-crossing identification card as a valid entry document for both “immigrants” and “nonimmigrants”. Section 101(a)(6) of the Act⁷⁸ defines the term “border crossing identification card” as follows:

The term “border crossing identification card” means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations.

As we have developed: The phrase “alien who is lawfully admitted for permanent residence” as used in this definition means an alien who has the status of a lawfully admitted “immigrant”. Both the “immigrant” domiciled here *and* the “immigrant” who commutes enjoy that status. The further phrase in Section 101(a)(6) “an alien who is a resident in foreign contiguous territory” thus obviously refers only to the “nonimmigrant” alien residing in foreign contiguous territory. It has been settled ever since *Albro* was decided, as we have discussed, that the alien commuter cannot be regarded as such a “non-immigrant” because he works in the United States on a continuing basis.

⁷⁸ 66 Stat. 166, 8 U.S.C. 1101(a)(6).

And we have noted that the Congress clearly understood the Immigration authorities recognized alien commuters to have the "status" of lawfully admitted "immigrants." As the Omnibus Study Report states, aliens lawfully admitted for permanent residence "who cross the borders frequently are known as commuters and are not nonimmigrants and they must apply for resident alien's border-crossing cards." Moreover, the Congress expressed no dissatisfaction whatever with respect to the established practice of issuing border-crossing identification cards to alien commuters identifying them as lawfully admitted "immigrants."

The only criticism the Congress made was directed at the issuance of border-crossing identification cards to "nonimmigrants." In that connection, as we have also discussed,⁸⁹ the Omnibus Study Report discloses that the Congress' concern was that "nonimmigrant" aliens who held nonresident border-crossing cards were utilizing the cards as a means of effecting entry, and then violating their temporary "nonimmigrant" status by unlawfully going to work and remaining in the United States.

What the Congress did in Section 101(a)(6) of the Act was to limit the issuance of "nonimmigrant" border-crossing cards to aliens who reside in Canada or Mexico at a point close to our border. If the "nonimmigrant" does not reside in close proximity to the border, he no longer qualifies for a "nonimmigrant" border-crossing card.⁹⁰

Accordingly, we conclude: When the technical, word-of-art, meanings of the immigration terms used are properly taken into consideration, all pertinent indicia on the face of the Immigration and Nationality Act of 1952, as well as all the relevant material to be found in the legislative history—considered in light the entire background and historical development of

⁸⁹ See fn. 66 *supra*, in which we quote the pertinent excerpt from the Omnibus Study Report.

⁹⁰ Appellants show their confusion on this point, as well. App. Br., p. 30. They there refer to the Committee's statement Section 106(a)(6) was intended to tighten up on the use of the border-crossing card by enacting "definite statutory limitations." As noted above, these limitations were designed to correct what the Congress felt was a too-loose administrative practice in issuing border-crossing cards to "nonimmigrant" aliens.

the immigration law—establish that the Congress in enacting the 1952 Act meant to and did carry forward unchanged into current law the existing alien commuter border accommodation. And the Immigration authorities' "longstanding and consistent administrative interpretation * * * has had both express and implied congressional acquiescence" here. *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

D. Following enactment of the Immigration and Nationality Act, the administrative recognition given alien commuters as entitled to continue enjoying "immigrant" status went on uninterrupted

Appellants err egregiously in asserting (App. Br., p. 28) that there was an interruption following the enactment of the Immigration and Nationality Act in the administrative recognition given alien commuters as entitled to continue enjoying "immigrant" status in the United States.

The Administrators' recognition given alien commuters as entitled to continue enjoying "immigrant" status actually went on uninterruptedly after enactment of the Immigration and Nationality Act in 1952. Because the Act itself codified into statutory form most of the administrative interpretations and practices evolved under the pre-existing immigration statutes, the Administrators found it unnecessary to issue such detailed regulations as had previously been in effect. The new regulations issued to implement that Act were limited to essentials only.

Furthermore, as appellants themselves point out, no question was raised at all for some two years after passage of the Immigration and Nationality Act as to the alien commuters being entitled to continued recognition as "immigrants." And, as we have discussed, in *Matter of H— O—*, 5 Imm. & Nat. Decisions 716, 718-719, the Board of Immigration Appeals on March 16, 1954 decided that the new Act in no way changed the long-existing recognition of alien commuters as being entitled to "immigrant" status. The Board there stated:

The phrase admission for permanent residence continues [under the new Act] to refer to a status by which the alien is granted the privilege of residing in the United States permanently as an immigrant upon lawful ad-

mission. Thus, a commuter who has been legally admitted as an immigrant is entitled to receive a border crossing identification card so long as he continues in that status. Similarly, a commuter is entitled to readmission * * * as a returning resident while he maintains this status and complies with conditions controlling the use of border crossing cards * * *.

It is therefore concluded that the practice of considering commuters as permanent residents has not been disturbed by the Act of 1952, but rather it has impliedly received congressional approval, since the legislative history of the Act reveals a discussion [sic] without dissent. Without clear statutory language requiring a mandatory change in the commuter scheme, the law cannot be construed as prohibiting this procedure. [Bracketed material supplied.]

We repeat for emphasis: Appellants are completely wrong in their statement that "at or near the time of the enactment of the statute [the Immigration and Naturalization Act] the Administrators of the Immigration and Naturalization Service did not consider commuters to be aliens of the immigrant class." They have fabricated that conclusion without a shred of substance to support it. The affidavits of the Intervenor appellees disclose that it is contrary to the actual facts in their individual cases.⁶¹

E. The long-standing administrative application of the statute challenged here is entitled to great weight, and should be affirmed by this Court if the ultimate merits need be reached on this appeal.

As we have indicated, the Congress, in enacting the Immigration and Nationality Act, expressly carried forward into cur-

⁶¹ J.A. 42-66. It is obvious that the Intervenor appellees continued to exercise their right to commute. If after enactment of the Immigration and Nationality Act in 1952 any examining immigration officer had challenged their right to enter as returning "immigrants", their cases would have had to be referred to a special inquiry officer for hearing. See Section 235(b) of the Act, 66 Stat. 198, 8 U.S.C. 1225(b). And if they had been excluded, their cases would have gone on appeal to the Board of Immigration Appeals. Thus, it is clear that in *Matter of H— O—* the Board of Immigration Appeals' decision was simply declaratory of the continuing alien commuter border practice which went on as before.

rent law the Administrators' long-standing and consistent application of the immigration law since 1927, recognizing alien commuters as continuing to enjoy the "immigrant" status they acquire when they initially enter with "immigrant" visas, so long as they do not become deportable or cease to commute.

But even if the Court is not prepared to go that far with us, we submit, surely in light of the foregoing full exposition the Court should agree that we are here concerned with a long-standing, contemporaneously-made, practical application of both the Immigration Act of 1924 and the Immigration and Nationality Act, enacted in 1952, by the Administrators charged with the task of making the various parts of these statutes work efficiently and smoothly while yet new.

No language in the Immigration and Nationality Act—when read with proper understanding of the technical, word-of-art, meanings of the pertinent terms employed in the immigration law—explicitly or by necessary implication shows that the Congress meant to alter or bar continued recognition of the alien commuters as entitled to "immigrant" status, so long as their status as lawful alien commuter "immigrants" does not change.

We recognize that absence of any unfavorable congressional action since enactment of the Immigration and Nationality Act is not determinative of what the Congress meant when it passed that Act. Yet, in view of the Congress' knowledge the Administrators continued to recognize alien commuters as entitled to the status of lawfully admitted "immigrants", so long as their status does not change, and the close supervision maintained by the Congress over the administration of the Act,⁸² the silence of the Congress at least implicitly indicates congressional acceptance of the administrative application of the statute as being properly in accord with the congressional intent in the matter.

And, in view of the important and sensitive foreign policy considerations involved, it is incredible to suppose that the Congress would have been silent in the committee reports accompanying the bills which came to be enacted as the Immigration and Nationality Act, if the Congress meant to make any

⁸² By the Joint Committee on Immigration and Nationality Policy established pursuant to Section 401 of the Act, 8 U.S.C. 1106, and otherwise.

change in the Administrators' long-standing application of the immigration law with respect to the alien commuters.

Therefore, we think, the following settled principles of statutory interpretation should govern if the merits need be reached for purposes of decision on this appeal:

An interpretation of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new, is entitled to great weight. *United States v. American Trucking Associations*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). Moreover, while administrative practice may not avail to overcome a statutory command so plain as to leave no room for construction. "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." *Norwegian Nitrogen Products Co. v. United States*, *supra*. And however clear the words of a statute may appear on "superficial examination," no "literal interpretation dogma" should bar the court from considering all available aids to its "reaching a correct conclusion" on the statutory interpretation problem at hand. *United States v. American Trucking Associations*, *supra*, 310 U.S. at 534.

"Literalness may strangle meaning." *Transcontinent Television Corp. v. Federal Communications Commission*, 113 U.S. App. D.C. 384, 388, 308 F. 2d 339, 343 (1962). The courts are under obligation to give language in a statute the meaning the Congress intends, though read literally it might bear a different meaning. And "the courts have less reluctance in regard when the interpretation they approve has been adopted by the agency charged with principal responsibility for administering the legislation, acting in the light of its special experience and expertise." *Los Angeles Mailers Union, etc. v. National Labor Relations Board*, 114 U.S. App. D.C. 72, 75, 311 F. 2d 121, 124 (1962).

Complete silence by the Congress "cannot be taken as the voice of change." *United States v. American Union Transport*, 327 U.S. 437, 453 (1946). And where the "Congress has spoken at best with ambiguous silence"; a long-continued administra-

tive practice "is more persuasive than consideration of abstract conflict between such a practice and purposes attributed to Congress." *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940).

Finally, where as here, important national policy considerations favor adoption of the interpretations of administrative agencies, acting within the area of their specialized competence and responsibility, the courts should be "slow to interfere with their conclusions when reconcilable with statutory directions." *Cf. United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956).

Accordingly, we urge, this Court should here adopt the Immigration authorities' reading of the pertinent provisions in the Immigration and Nationality Act, as carrying forward unimpaired the long-standing recognition of alien commuters as entitled to the status of lawfully admitted "immigrants", so long as they do not become deportable or cease to commute.

F. The decision in *Amalgamated Meat Cutters, etc. v. Rogers*, 186 F. Supp. 114 (1960), is in error, and to the extent necessary should be overruled

To the extent that Judge Youngdahl's opinion in *Amalgamated Meat Cutters, etc. v. Rogers*, 186 F. Supp. 114 (1960) is contrary to the conclusion reached here, we respectfully submit, that opinion is in error, and to the extent necessary should be overruled. As we have noted, the number of aliens involved in *Amalgamated* dwindled before the case was finally decided, the matter became substantially moot, and the case was not appealed.

In *Amalgamated*, Judge Youngdahl fell into the same basic error as do appellants here. Judge Youngdahl there utterly failed to recognize that the term "lawfully admitted for permanent residence" is given a *precise* definition in Section 101 (a)(20) of the 1952 Act. Thus, Judge Youngdahl went contrary to the letter of the statute and the expressed intent of the Congress, when he construed the term "lawfully admitted for permanent residence" as though it reads "residing permanently in the United States." 186 F. Supp. at 116 (fn. 2), 118-119. He concluded that, because alien commuters do not reside in the United States, "it is not possible for them to be aliens lawfully admitted for permanent residence." That is not so.

As we have fully discussed, the "immigrant" lawfully admitted for permanent residence has the privilege, if he desires to avail himself of it, of residing permanently in the United States. But neither under the 1924 Act, nor under the Immigration and Nationality Act, is he required to establish his permanent residence here for the purposes of the immigration law.

Judge Youngdahl also fell into basic error on another important point. In his opinion, he stated that when the lawfully admitted "immigrant" alien (in Judge Youngdahl's mistaken terminology, the "resident alien") departs from the United States, his status as a "resident alien" is lost. 186 F. Supp. at 118. This was not so under the 1924 Act, and is not so under the Immigration and Nationality Act. As we have discussed, an alien lawfully admitted as "immigrant" may make temporary departures from the United States without losing his recognized status as an alien "lawfully admitted for permanent residence" within the meaning of Section 101(a)(20) of the Act. He is also entitled to recognition as a non-quota "immigrant" under Section 101(a)(27)(B) of the Act. And he is likewise entitled to a reentry permit in accordance with the terms of Section 223 of the Act.⁸³

This further error led Judge Youngdahl to misread the purport of the exception the Congress wrote into Section 212(a)(14) of the Act, the certification section with which *Amalgamated* was concerned.⁸⁴ Judge Youngdahl's error in equating the lawfully admitted "immigrant" alien with the "resident alien" led him to completely miss the point that in drafting the Section 212(a)(14) exclusion provision, the Congress specifically excepted the lawfully admitted "immigrant" alien from the operation of that bar. The Congress there limited the Section 212(a)(14) bar against aliens entering to work here in undue competition with American workers to the following classes of aliens:

⁸³ 66 Stat. 194, 8 U.S.C. 1203.

⁸⁴ As we have noted, Section 212(a)(14) of the Act is not directly involved here. The Secretary of Labor has issued no Section 212(a)(14) certification. Hence, strictly speaking, the precise ruling Judge Youngdahl made—that "when the Secretary of Labor has issued a certification under § 212(a)(14) pertaining to particular employment, * * * [a commuter] alien would be excludable" (at 186 F. Supp. 119)—is not apposite here.

<i>Category</i>	<i>Explanation</i>
(1) An alien in the non-preference category of Section 203(a)(4) of the Act—	(1) This alien is a quota "immigrant" not entitled to any preference in the issuance of a quota "immigrant" visa.
(2) An alien described in Section 101(a)(27)(C) of the Act—	(2) This is an alien born in any independent country in the Western Hemisphere, or the spouse or child of such an alien (but an alien who is a returning "immigrant" is exempted from this category).
(3) An alien described in Section 101(a)(27)(D) of the Act—	(3) This is an alien who lost United States citizenship and who may re-acquire such citizenship under special provisions in the naturalization law.
(4) An alien described in Section 101(a)(27)(E) of the Act—	(4) This is an alien who lost United States citizenship by acquiring foreign nationality through naturalization in a foreign state.

As we explained: Under both the 1924 Act and the Immigration and Nationality Act an alien lawfully admitted as an "immigrant" thereafter acquires a recognized "status" in the United States. He is entitled to the privilege of acquiring permanent residence in this country, but need not avail himself thereof. *He is also entitled to recognition thereafter as a non-quota "immigrant" under Section 101(a)(27)(B) of the Act.* That is the nonquota "immigrant" category described as "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad". The alien commuter daily crossing the border is regarded as entitled to reentry as a Section 101(a)(27)(B) nonquota "immigrant". All lawfully admitted "immigrants" enjoy this status, whether originally admitted as a quota "immigrant", or a nonquota "immigrant", under other categories specified in Section 101(a)(27) of the Act.

The critical point here that Judge Youngdahl failed to grasp is this: The categories (1)-(4) of aliens that are listed above, who the Congress made subject to the Section 212(a)(14) bar, do *not* include the Section 101(a)(27)(B) nonquota returning "immigrant". For that reason the lawfully admitted "immigrant" returning after a temporary absence is not subject to the Section 212(a)(14) bar.

The obvious reason why the Congress made this exception is that the lawfully admitted "immigrant" returning after a temporary absence has already become as much a part of our permanent labor force as any other workers in the country. Recognizing this, and wanting him to be able to have his family (if not yet here) join him in the United States, the Congress wrote a specific exception into the Section 212(a)(14) exclusion bar on behalf of—

the parents, spouses, or children of * * * aliens lawfully admitted to the United States for permanent residence.

Judge Youngdahl, entirely missing this point, stated in his *Amalgamated* opinion (186 F. Supp. at 118):

The statute speaks of the parents, spouses and children of resident aliens and does not cover the resident aliens because the statute only permits exclusion, not deportation.⁸⁵ Relatives of a resident alien are amenable to exclusion; the resident alien is not himself so amenable because once he departs from the United States, his status as a resident alien is lost.⁸⁶ * * *

These errors in Judge Youngdahl's opinion in the *Amalgamated* case contributed to his making a further error that we regard as important here. He stated in that opinion (186 F. Supp. at 117):

⁸⁵ This statement is patently in error. Section 241(a)(1) of the 1952 Act, 8 U.S.C. 1251(a)(1), makes any alien deportable who was at the time of entry subject to exclusion. And as we have explained, the lawfully admitted "immigrant" alien makes a new "entry" for purposes of the immigration law each time he reenters.

⁸⁶ As we have noted, this statement is also patently erroneous. The lawfully admitted "immigrant" alien does not lose his recognized "immigrant" status when he makes a temporary departure and a reentry.

* * * Mexican commuters destined for the employment covered by the [Secretary of Labor's] certification must be excluded just as any other Mexican non-resident alien. To do otherwise would be to permit administrative practice to make a shambles of a provision which, with § 101(a)(15)(H), was newly designed by the 1952 Act in order to assure "strong safeguards for American labor."

There are two errors in this statement. *First*, alien commuters, by operation of Section 101(a)(20) of the Act, enjoy the "status" of lawfully admitted "immigrants". Hence, they are not to be regarded as being like "any other * * * non-resident alien." *Second*, Judge Youngdahl, by taking the phrase "strong safeguards for American labor" entirely out of the context in which the Congress used it in the reports accompanying the bills which came to be enacted as the 1952 Act, entirely misread its purport.

As we shall develop, the legislative history makes it clear that the Section 212(a)(14) certification procedure as to "immigrants," and the Section 101(a)(15)(H) provision as to "nonimmigrants," coming here to work, incorporated into the Immigration and Nationality Act, were simply meant to be a modern substitute for the outmoded alien contract labor provisions in the preexisting immigration law. And, through all the years the alien commuter border accommodation has been in effect, no inconsistency has been perceived between the alien commuter border practice, on the one hand, and the alien contract labor provisions in the immigration law, on the other.⁶⁷

Protection of American labor has long been woven into the fabric of our immigration law. In no sense is the Immigration and Nationality Act to be regarded as bringing American labor's interests into play as a new factor in the law.

As we have noted: The alien contract labor exclusion provisions early originated as a measure enacted to safeguard American labor from competition by menial foreign laborers, enter-

⁶⁷ The affidavits filed in this cause by Intervenor appellees disclose there are alien commuters who have been steadily employed in the United States for decades. Such aliens are certainly as much a part of our permanent labor force as any other workers in the country.

ing while still abroad into contract with American employers, to come to the United States to work at low wages which would badly depress the American labor market. The original alien contract labor exclusion law in 1885 made it unlawful to import aliens under contract to perform labor of any kind. An exception permitted the importation of skilled labor when available labor of like kind could not be found in the United States.⁸⁸ Succeeding immigration statutes carried the alien contract labor provisions forward in substantially unchanged form (insofar as we are concerned with them here). Last controlling prior to their supersession in 1952 by the Immigration and Nationality Act were the contract labor provisions in the Immigration Act of 1917.⁸⁹

The same general objective, to protect the interests of American labor, was, as we have already seen, a major legislative purpose for the imposition of "immigrant" quota restrictions by the 1924 Act. To safeguard American labor from undue competition, the 1924 Act limited the numbers of "immigrant" aliens who could come here from countries outside the Western Hemisphere to seek work in competition with American workmen.⁹⁰

In the Omnibus Study Report, S. Rep. No. 1515, the Senate Committee on the Judiciary concluded that the contract labor provisions were outmoded, and that the contract labor exclusion clause should be entirely deleted from the law. The Com-

⁸⁸ See the Omnibus Study Report, at p. 359. A discussion of the purpose of the original alien contract labor law appears in *Church of Holy Trinity v. United States*, *supra*, 143 U.S. at 463-464. As we have noted, *Church of Holy Trinity* decided that the contract labor law barred only manual laborers, not aliens whose work was predominantly mental in nature. The original alien contract labor exclusion law was paralleled in essential purpose by the early Chinese Exclusion Acts, designed to bar cheap, "coolie" labor, and by the "Gentlemen's Agreement" President Theodore Roosevelt entered into with Japan in 1907. The latter limited the entry of Japanese laborers. For a good summary of these early protective measures, see the Omnibus Study Report at pp. 49-53.

⁸⁹ Sections 8, 5 of the Act; 39 Stat. 876 and 879; former 8 U.S.C. 136(h) and 139.

⁹⁰ In the *Albro* decision, as we have noted, the Supreme Court determined upon its examination of the legislative history of the 1924 Immigration Act that "the history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor." 279 U.S. at 243-244.

mittee then went on to discuss the provisions included in the draft omnibus bill, in lieu of the obsolete alien contract labor provisions.⁹¹ A like discussion appears in the later Committee Reports⁹² accompanying the bills which came to be enacted as the Immigration and Nationality Act in 1952. These later reports contain substantially identical⁹³ explanations of the Section 212(a)(14) certification procedure. The House Report states:

Those provisions in existing law relating to the exclusion of contract laborers and persons induced or assisted to come to this country and certain similar provisions are omitted from the bill in view of the adoption of a principle of selectivity in the allocation of quota numbers or permits for temporary residence on the basis of the need for the labor and services of aliens.

While the bill will remove the "contract labor clauses" from the law, it provides strong safeguards for American labor.⁹⁴ Section 212(a)(14) provides for the exclusion of aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor if the Secretary of Labor has determined that there are sufficient available workers in the locality of the aliens' destination who are able, willing, and qualified to perform such skilled or unskilled labor and that the employment of such aliens will adversely affect the wages and working conditions of workers in the United States similarly employed. This provision is applicable to all aliens other than those whose services have been determined to be needed in the United States under certain other provisions of the bill or who are entitled to preferential treat-

⁹¹S. Rep. No. 1515, 81st Cong. 2d Sess. (1950), at pp. 362-363.

⁹²S. Rep. No. 1137, 82d Cong. 2d Sess. (1952), at p. 11; it accompanied S. 2550. And H. Rep. No. 1365, 82d Cong. 2d Sess. (1952), at pp. 50-51; it accompanied H.R. 5678. See Commentary accompanying Title 8 U.S.C.A. by Walter M. Besterman, Legislative Assistant, Committee on the Judiciary, House of Representatives, at p. 53.

⁹³The House Committee Report contains an introductory paragraph lacking in the Senate Committee Report.

⁹⁴We believe Judge Youngdahl's reference in *Amalgamated* to the "strong safeguards for American labor" is to this particular statement.

ment because of their relationship to United States citizens or *aliens who have been lawfully admitted for permanent residence*. It is the opinion of the committee that this provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country. [Emphasis supplied.]

As the history of the alien commuter border accommodation shows, the practice has never been considered to transgress the provisions long included in the immigration law, designed to safeguard the interests of American labor. And the Congress took note of its existence, and expressed no dissatisfaction with the practice, in the process of drafting the bills which ultimately came to be enacted as the Immigration and Nationality Act.

We think it is fair to conclude, therefore, that the Section 212(a)(14) certification procedure, placed in the law in substitution for the alien contract labor provisions, was in no wise directed at the longstanding, recognized, alien commuter border practice. Judge Youngdahl erred in inferring otherwise from the phrase he took entirely out of context and used in his *Amalgamated* opinion.

It is thus clear that Judge Youngdahl's opinion in *Amalgamated* is replete with basic errors and misconceptions as to the operation under, and the technical, word-of-art, meanings of, the various pertinent terms in the immigration law. And to the extent necessary this Court should overrule it.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed on the jurisdictional, or abstention-from-taking-jurisdiction, grounds urged herein. In the event it is necessary to reach the merits, the judgment of the District Court should be modified (as authorized by 28 U.S.C.

2106) so as to indicate dismissal of the case on the merits, and, so modified, affirmed.

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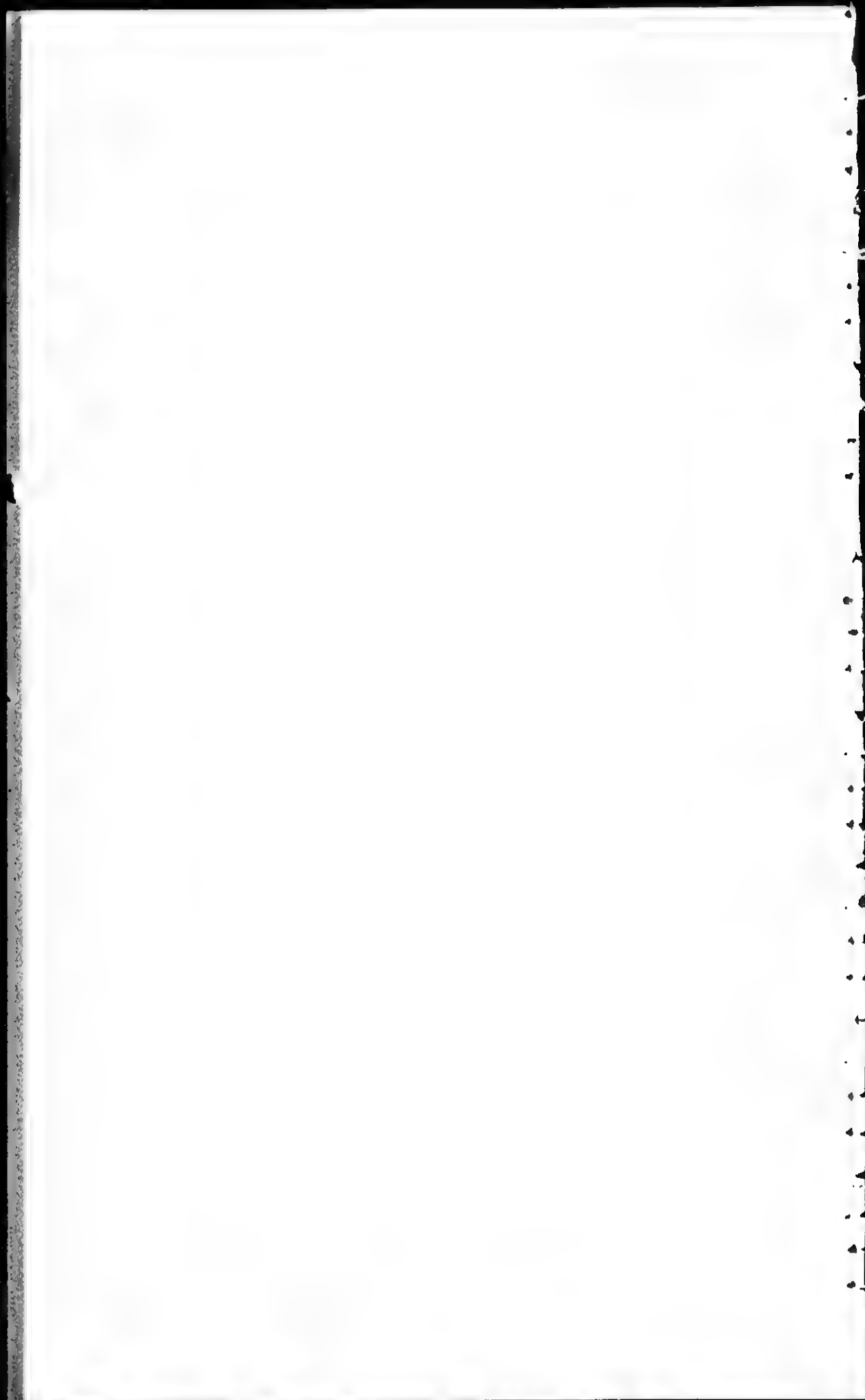
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BRIEF FOR INTERVENOR APPELLEES

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,976

TEXAS STATE AFL-CIO, ANTONIO AGUILAR, JULIA AMAYA,
ET AL., *Appellants*,

v.

ROBERT KENNEDY, ATTORNEY GENERAL, and
RAYMOND F. FARRELL, COMMISSIONER OF IMMIGRATION AND
NATURALIZATION, *Government Appellees*,

and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES (LEYVA),
CONCEPCION AURORA CAGIGAS FRAJO, ET AL.,
Intervenor Appellees.

On Appeal From Judgment of District Court of District of
Columbia Dismissing Action

United States Court of Appeals

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FILED NOV 20 1963

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QUESTION PRESENTED

In the opinion of the Intervenor Appellees, the question before this court is simply:

Did the District Court err in dismissing an action in which the residents of five Texas counties and a labor organization representing the residents of such counties and affiliated labor unions sought to change the classification of "commuters" from a classification of "immigrant" to one of "non-immigrant" and thereby to cancel the status and rights of commuters under the Immigration and Nationality Act of 1952?

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On Appeal From Judgment of District Court of District of
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BRIEF FOR INTERVENOR APPELLEES

COUNTERSTATEMENT OF THE CASE

The Complaint

Appellants (plaintiffs below) here seek review of the judgment of the District Court for the District of Columbia dismissing this action.

Appellants are the Texas State AFL-CIO and 188 United States citizens residing in five Texas counties along the

United States-Mexican border. The complaint, filed October 20, 1961, seeks a declaratory judgment and an order in the nature of mandamus and names as defendants the Attorney General of the United States and the Commissioner of Immigration and Naturalization.

Appellants seek in this action to change the long standing (since 1927) and continuous practice of the Immigration and Naturalization Service with respect to "commuters".¹ Appellants seek to change the United States Immigration Service's classification of commuters from "immigrants" to "non-immigrants", and to have the court declare that commuters have "no legal status" (J.A. 22)—thereby divesting commuters of the rights and status that they have been afforded under United States immigration laws.

Crushing Hardship to the Commuter

On December 30, 1961, Thomas Alvarado (Lugo) and eighteen others petitioned the court for leave to intervene as defendants in this action both as individuals and as representatives of the class of Mexican commuters. Each Applicant for Intervention was a Mexican citizen (1) who had been classified by the Immigration and Naturalization Service as an immigrant and as being lawfully admitted for permanent residence and (2) who commuted from his home in Mexico to employment in the United States. The issues raised by the complaint, which challenged the status, rights and classification of commuters, were, of course, of vital and most serious importance to all commuters, both Mexican and Canadian. The court granted intervention by order dated January 29, 1962.

The affidavits of the Intervenor, attached to the answer filed on their behalf in this action, disclose the overwhelm-

¹ The term "commuter" as used in this brief describes an alien who has been lawfully admitted for permanent residence to the United States and who commutes to a place of employment in the United States from his home in foreign contiguous territory, i.e., Mexico or Canada.

ing hardship that would result to Mexican commuters if they were to lose their status and rights. As disclosed by the affidavits, commuters have been working in this country, some continuously since 1927. (J.A. 46, 55). They have wives, children, parents, and other relatives in Mexico who are entirely dependent upon them for support. Many members of these families would be unable to come into the United States if the commuter were to lose his right to commute and the commuter would be unable to support two homes.

In acquiring their rights and status, commuters have been advised by United States immigration officials that it is not necessary for them to have actual residence in the United States. (J.A. 51). The commuters have relied upon these representations of the United States officials and have fashioned their lives and those of their dependents around the right to commute. To take this right suddenly away would result in crushing hardship.² (J.A. 42-66).

Action Dismissed

The Intervenor Defendants and Government Defendants filed motions to dismiss this action on November 5 and 6, 1962, respectively.

Grounds which were urged for dismissal of this action include the following:

1. The complaint fails to state a claim upon which relief can be granted. (J.A. 37, 81). Appellants' reliance upon the Immigration and Nationality Act of 1952 is misplaced. The classification, status and rights afforded commuters

² An indication of this hardship may be gained by reading the affidavits of the Intervenor Appellees. The hardship to Thomas Alvarado (Lugo) is typical. His affidavit discloses "that he supports in Mexico his wife, six children and his mother who is old. That he is employed in El Paso, Texas as a polisher. That if he were to lose his right to commute, it would work great personal and economic hardship on himself and his family; that he would be financially unable to bring all whom he supports to the United States, and that he would be unable to support two homes." (J. A. 42).

by the United States immigration officials is in accordance with law and was approved by (and not proscribed by) the 1952 Immigration and Nationality Act. (See Argument, Part II, *infra*).

2. The Texas State AFL-CIO and the 188 Texas residents who bring suit do not have standing to sue. (J.A. 81). Neither the Immigration and Nationality Act of 1952 nor the Administrative Procedure Act affords these plaintiffs standing. Plaintiffs are not directly aggrieved. The injuries alleged are remote and speculative. The alleged unemployment and depressed wages and working conditions,³ the alleged difficulties of organized labor,⁴ and the alleged creation of animosity between Mexico and the United States do not create standing for plaintiffs to bring this action. (See Argument, Part I, *infra*).

3. The question whether commuters should be classified as "immigrants" or as "non-immigrants" is a political one. (J.A. 80). Such a question affects foreign relations of the United States and also has an effect on domestic

³ At Page 8 of the Brief for Appellants there are set forth rates of unemployment for six Texas counties along the Mexican border as shown by the 1962 *County and City Data Book*, U.S. Department of Commerce Bureau of the Census. At the oral argument in the District Court, Intervenor Defendants urged the court to take judicial notice of the fact that the same source showed that other counties in Texas nowhere near the Mexican border had comparable rates of unemployment. Intervenor Defendants also urged the court to take judicial notice of the publication of the U. S. Department of Labor entitled *Area Labor Market Trends*, December 1962 Supplement. Page 25 thereof shows that the worst areas of unemployment in Texas are not along the Texas-Mexican border.

The Brief for Appellants also cites a Department of Labor report prepared by Mr. Parnass. On November 5, 1962, Intervenor's in "Intervenor's Statement of Genuine Issues in Opposition to Plaintiffs' Motion for Summary Judgment" pointed out that it was Intervenor's position that inasmuch as the party who prepared the report had no personal knowledge of the facts contained therein that the report was inadmissible in evidence and therefore not proper material for consideration by the court. (J.A. 89-90).

⁴ Certain of the Intervenor's who have entered this lawsuit in opposition to Plaintiffs' action are union members. (J. A. 47, 52, 53 and 57).

economic matters. As such, it is a question for the Executive and Legislative branches of the Government and not for the Judiciary. (See Argument, Part I, *infra*). Indeed, the Congress is presently considering the question of the commuter and his status. Staff of Sub-Comm. No. 1, House Comm. on the Judiciary, 88th Cong., 1st Sess., Study of Population and Immigration Problems, Administrative Presentations (III), Admission of Aliens Into the United States for Temporary Employment, and "Commuter Workers" (Comm. Print. 1963).

4. Assuming *arguendo* the court has jurisdiction in this action seeking a declaratory judgment and an order in the nature of mandamus, the court should refuse to entertain this equity jurisdiction because the litigation here necessarily involves sensitive foreign affairs considerations, and a decision adverse to the Government would have a serious, deleterious effect upon the foreign relations of the United States. (J.A. 81).

In connection with this ground, it should be noted that there was filed in this action an Affidavit by the Secretary of State, in which he declared "it is my opinion that a judgment on the merits in this case would be undesirable from the standpoint of the foreign relations of the United States." (J.A. 85).

The Secretary of State's Affidavit also declared as follows:

In my judgment the present practice with regard to commuters across the United States-Mexican border contributes to the friendly relations between the United States and Mexico. . . .

In a very real sense, the cities along the border—for example, El Paso and Juarez, Eagle Pass and Piedras Negras, Laredo and Nuevo Laredo, Brownsville and Matamoros, and San Diego and Tijuana—have grown into single economic communities. A disruption in the life of these communities would do real harm to good neighbor relations in the area.

. . .

Because of the size and influence of Mexico in Latin America, the success of the Alliance for Progress will depend in large measure on the achievement of this program in Mexico. The harm to United States-Mexican relations which I believe would be the result of a termination of the commuter practice could seriously jeopardize the Alliance for Progress in Mexico, and thus in all Latin America.

The present practice with regard to commuters is in effect not only at the border between the United States and Mexico, but also at the border between the United States and Canada. The Government of Canada, like the Government of Mexico, has expressed its concern over the present litigation, and an adverse decision could also adversely affect our relations with Canada and the status of United States nationals and property employed in that country. (J.A. 83-85).

5. Assuming *arguendo* it has jurisdiction, the court should refuse to entertain jurisdiction in this matter because of serious hardship that would result to commuters and their families if they were to lose the right to commute. (J.A. 80).

On April 11, 1963, the District Court granted Government Defendants' and Intervenor Defendants' motions to dismiss and dismissed this action with prejudice. (J.A. 108). It entered no opinion and did not state the grounds for dismissal.

STATUTE INVOLVED

Intervenor appellees rely upon the following statutory provision in addition to the authorities contained in the appendix to the Brief for Appellants:

Immigration and Nationality Act of 1952, § 316(a),
66 Stat. 242, 8 U.S.C. § 1427(a) (1958).

Requirements of Naturalization—Residence

No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner,

(1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

SUMMARY OF ARGUMENT

It is Intervenor Appellees' position that the District Court did not err in dismissing this action. In fact, we submit, the District Court would have erred if it had failed to do so. Part I of the Argument herein discusses the several grounds for dismissal, any one of which affords a proper basis for the dismissal of this action by the District Court.

In Part II of the Argument herein Intervenor Appellees show that the 1952 Immigration and Nationality Act approved and confirmed the classification, status and rights afforded commuters by the United States Immigration Service and that it did not proscribe the commuter practice as Appellants contend.

The heart of Appellants' position lies in Appellants' violent interpretation of Section 101(a)(20), 8 U.S.C. § 1101(a)(20) of the Immigration and Nationality Act of 1952 which defines the term "lawfully admitted for permanent residence" as:

the *status* of having been lawfully accorded the *privilege* of residing permanently in the United States

as an immigrant in accordance with the immigration laws, such status not having changed. (Emphasis supplied.)

One "lawfully admitted for permanent residence" has the *status* of having the *privilege* of residing permanently in the United States as an immigrant. However, Appellants contend that the foregoing definition establishes residence in the United States as a requirement for being classified as "lawfully admitted for permanent residence." As will be shown in Part II hereof, Appellants' contention is not justified by the facts. For the 25-year period preceding enactment of the 1952 act (or since 1927) residence was not required of "commuters" who were classified as immigrants lawfully admitted for permanent residence. The commuter had the *privilege* of residing permanently in the United States as an immigrant. There was no requirement that he exercise that privilege. The definition of "lawfully admitted for permanent residence", as contained in the 1952 act, dovetails perfectly with the prior practice of 25 years. There is no basis for stating that this statutory term changed the law and established residence as a requirement for being classified as an immigrant. Furthermore, it will be shown in Part II that commuters can not properly be classified as "non-immigrants" as Appellants contend.

ARGUMENT

Part I

The District Court Did Not Err in Dismissing This Action

This court in considering the appeal from the judgment of the District Court must bear in mind that all intendments must be indulged in favor of the correctness of the judgment. *Continental Can Co. v. Horton*, 250 F. 2d 637, 645 (8th Cir. 1957).

In a situation where, as here, the District Court has dismissed an action, the decision of the District Court should

be affirmed if the order of dismissal could be sustained on any of the grounds urged by defendant in support of its motion to dismiss, *Nashville Milk Co. v. Carnation Co.*, 238 F. 2d 86 (7th Cir. 1956), *aff'd* 355 U.S. 373 (1958), or on any other ground disclosed in the record. *Siebrand v. Gossnell*, 234 F. 2d 81, 88 (9th Cir. 1956).

We submit that the District Court did not err in dismissing the complaint. In fact, we submit that the Court would have erred if it failed to dismiss this action.

The decision of the District Court can be sustained on any of the following grounds:

(1) Refusal to entertain suit was discretionary. Assuming *arguendo* that the court had jurisdiction in this matter, it was within the discretion of the court to determine whether it would entertain such jurisdiction, and whether it would grant the equitable relief of a declaratory judgment or an order in the nature of mandamus. *Public Service Comm'n. v. Wycoff Co.*, 344 U.S. 237 (1952); *Alabama State Federation v. McAdory*, 325 U.S. 450 (1945); *Heyward v. Public Housing Administration*, 94 U.S. App. D.C. 5, 214 F. 2d 222 (1954); *Pan American World Airways, Inc. v. Boyd*, 207 F. Supp. 152, 159 (D. D.C. 1962). Where governmental action is involved:

It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. *Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.* (Emphasis supplied.) *Eccles v. Peoples Bank*, 333 U.S. 426, 431 (1948).

This court's interest is to determine whether or not the court below abused its discretion. *Cameron v. President & Fellows of Harvard College*, 157 F. 2d 993 (1st Cir. 1946).

In a circumstance where, as here, the Secretary of State has indicated his concern and informed the court of his

view that the case should not be entertained on its merits, it is clear, we submit, that the District Court did not abuse its discretion in refusing to entertain jurisdiction. (J. A. 81-85). We submit also that the court would have been justified in refusing to entertain jurisdiction on the basis of the tremendous hardship that would have resulted to commuters had it entertained this action and granted the relief sought by plaintiff. (J. A. 42-66).

(2) The court was without jurisdiction because this proceeding presents a political and not a judicial question.

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

The federal courts have long recognized the existence of a class of controversies which do not lend themselves to judicial standards and judicial remedies. Among subject matters which the federal courts have considered as inappropriate for judicial review are those matters involving the foreign relations of the United States. *E.g.*, *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Z. and F. Assets Realization Corp. v. Hull*, 72 App. D.C. 234, 114 F. 2d 464, 468-70 (1940), *aff'd*, 311 U.S. 470 (1941).⁵ Immigration, moreover, since it deals with the

⁵ In *Z. and F. Assets Realization Corp. v. Hull*, 72 App. D.C. at 238, 114 F. 2d at 468, the U. S. Court of Appeals for the District of Columbia, through Justice Miller, observed:

Among the questions which have been recognized as political rather than judicial in nature, none comes more clearly within the former classification than those which involve the propriety of acts done in the conduct of the foreign relations of our government.

admission and exclusion of aliens, is an exercise of a sovereign power in international relations. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952); *Fong Yue Ting v. United States*, *supra*.

While every case or controversy which touches foreign relations will not necessarily lie beyond judicial cognizance, *Baker v. Carr*, 369 U.S. 186 (1962) (dictum), nevertheless where the nature of the problem is such that it is a delicate and complex decision in our foreign relations, it is a decision of a kind for which the judiciary has neither the facilities nor the responsibility. *Chicago & S. Air Lines v. Waterman S. S. Corp.*, *supra*; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-21 (1936).

This case obviously presents an issue which involves a delicate and complex question affecting the foreign relations of the United States. The Executive branch of the Government has considered the status and rights of commuters under the Immigration and Nationality Act of 1952. *Matter of H— O—*, 5 I&N Dec. 716 (1954); *Matter of S—, G—, & C—*, 8 I&N Dec. 209 (1958). And see *Matter of L—*, 8 I&N Dec. 643 (1960) (upholding commuter status as lawful).

The Congress also is aware and has given attention to the question of the status and rights of commuters. Staff of Sub-Comm. No. 1, House Comm. on the Judiciary, 88th Cong., 1st Sess., Study of Population and Immigration Problems, Administrative Presentations (III), Admission of Aliens Into the United States for Temporary Employment, and "Commuter Workers" (Comm. Print. 1963). The question here is obviously not a judicial one.

(3) The plaintiffs below have no standing to sue. The plaintiffs below in this proceeding are (1) the Texas State AFL-CIO, suing in its representative capacity on behalf of its members and the members of organized labor affiliated with the Union, and (2) some 188 individual persons residing in five counties in Texas, suing as individuals and as representatives of a class.

In no instance does the complaint allege the invasion of what the courts would consider a substantive legally protected right of these plaintiffs. There is no allegation of an injury to a particular right of plaintiffs', as distinguished from the interest of the public in the administration of law, so as to give plaintiffs the necessary standing to sue.⁶ *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922). More is necessary than a common concern for obedience to law. *L. Singer & Sons v. Union Pac. Ry. Co.*, 311 U.S. 295, 304 (1940).

As to allegations by plaintiffs of damage, viz., the depressed economy of the border area, the problems of organizing labor, depressed wage rates and unemployment, such allegations of damage are not in themselves a source of legal rights where they are a consequence of governmental action not in itself an invasion of recognized legal rights. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 137 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 483 (1938); *Associated Industries, Inc. v. Ickes*, 134 F. 2d 694, 700-01 (2d Cir. 1943), *vacated for mootness*, 320 U.S. 707 (1943).

(4) The complaint fails to state a cause of action. The classification, status and rights of commuters under the Immigration and Nationality Act of 1952 is in accordance with the Immigration and Nationality Act, as shown in Part II, *infra*.

⁶ Plaintiffs' interest in the administration of the immigration laws is similar to that which various ethnic or religious groups, employers, other unions and other sections of the country might have. This interest does not, however, confer standing.

Part II

The Commuter Program is in Accordance With the Immigration and Nationality Act of 1952

Subsequent to the passage of the Immigration Act of 1924, the United States Immigration authorities issued and placed in effect on April 1, 1927, General Order No. 86. Under this Order, aliens commuting from homes in Canada or Mexico to regular employment in the United States were classified as "immigrants." It was the view of the immigration authorities that commuting aliens being engaged in regular employment did not fall within any of the categories of "non-immigrants" set out in the statute and that, accordingly, commuters were immigrants.

The 1927 classification of commuters as "immigrants" was challenged in the courts. The classification was upheld by the Supreme Court in *Karnuth v. United States ex rel. Albro*, 279 U.S. 231, 242-43 (1929). The Supreme Court, in sustaining the Administrator's view that commuters were immigrants, stated:

... we are not concerned with the ordinary definition of the term "immigrant," as one who comes for permanent residence. The Act makes its own definition. . . . The term . . . includes every alien coming to this country *either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions.* (Emphasis supplied.)

From 1927 until 1952 commuters were classified as immigrants. Actual residence in the United States was not a requirement for obtaining immigrant status. The question, therefore, presents itself—Did the 1952 Immigration and Nationality Act change this practice? The answer is, we submit, that it did not.

At the time of enactment of the 1952 Act, the Congress was cognizant of the commuter program. S. Rep. No. 1515, 81st Cong., 2d Sess., 535 (1950); S. Rep. No. 1137, 82d Cong., 2d Sess., 4 (1952); H. R. Rep. No. 1365, 82d Cong., 2d Sess.,

32 (1952). We submit that it is clear from the following circumstances that the 1952 Act did not change, but rather approved and confirmed the law with respect to this program:

(1) Although Congress was aware of the commuter program, the statute makes no specific reference to commuters, their status or rights. We submit that, if the Congress had intended to change the practice with respect to commuters, it would have stated its intention to do so. There were commuters who had acquired status and rights under the 1924 Act. Were these commuters to be divested of their status and rights? Was the classification of these commuters to be switched from "immigrant" to "non-immigrant"? If there was to be a change, was it to have a retroactive or only a prospective effect? If a fundamental change of the type contended by Appellants had been intended, we submit the Congress would have spelled it out.

(2) There is a clear distinction under the law between "immigrants" and "non-immigrants." The rights and the status of each are different. Changes in classification from one category to the other are carefully regulated by the statute. §§ 245, 247, 248; 8 U.S.C. §§ 1255, 1257 and 1258 (1958). If a change in classification was to have been made, the Congress, it is clear, would have stated the effect of such a change upon the commuter's status and rights.

(3) When the Congress seeks to make *actual residence* in the United States a requirement for obtaining a status or right, it does so in clear language, *e.g.*, in order for an immigrant to be naturalized, the statute is very clear that five years' residence in the United States is required.⁷ § 316(a), 8 U.S.C. § 1427(a) (1958). In contrast, if actual residence in the United States was to be made a requirement

⁷ We submit that the definition of "residence" is set forth in the definitions section of the statute in order to define that term in connection with the "residence" requirements of § 316(a), 8 U.S.C. § 1427(a) (1958).

for obtaining the status of an immigrant, we submit the Congress would have said so.

(4) The 1952 legislation is so drafted that it dovetails precisely with the practice of the Immigration Service with respect to commuters at the time of its enactment.

The phrase "lawfully admitted for permanent residence," as defined in the definition section of the statute § 101(a)(20), 8 U.S.C. § 1101(a)(20), means:

[T]he status of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. (Emphasis supplied.)

Commuters historically have had the *status* of having the *privilege* of residing permanently within the United States. This definition does not set up a requirement of *actual residence*. This definition does not change prior practice. One can clearly be "lawfully admitted for permanent residence" without being an actual resident in the United States.

The Error in Appellants' Position

Appellants' position is entirely inconsistent with basic, long-standing tenets of immigration law. The positions which appellants argue are inconsistent with precedent and present law. In essence, appellants argue two points:

(1) They argue that the definition of the phrase "lawfully admitted for permanent residence" requires that a person so classified must actually reside in the United States. Such a contention is not only not supported by the language of the definition of the term but is, as has been pointed out above, contrary to the continuous practice of the immigration authorities since 1927.

(2) Appellants also take the position that commuters should be classified as non-immigrants under Section 101(a)(15)(H)(ii):

... an alien having a residence in a foreign country which he has no intention of abandoning ... who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

To argue that commuters may be classified as falling within this category is to overlook the fact that since 1927 it has been an established tenet of immigration law that engaging in regular employment in the United States cannot be viewed as coming "temporarily" to the United States or to perform temporary service.

In the only case decided under Section 101(a)(15)(H) it was held that this section was not applicable to an alien who sought a position of a permanent nature. *Matter of M—S—H—*, 8 I&N Dec. 460 (1960).

In 1954 the Immigration and Naturalization Board decided the question of whether commuters could be classified as "non-immigrants" under Section 101(a)(15)(H). In stating that they could not, the Board declared in *In the Matter of H—O—*, 5 I&N Dec. 716, 717 (1954):

Since section 101(a)(15)(B) of the act of 1952 has not changed the statutory provisions governing nonimmigrant temporary visitors, commuters may not be admitted under this section any more than they were eligible for admission under section 3(2) of the act of 1924. Nor has section 101(a)(15)(H) specifically changed the administrative practice for commuter admissions. However, although section 101(a)(15)(H) has added a new statutory (sic) class of nonimmigrants, alien commuters as persons coming to the United States to engage in regular employment are not included in this group of aliens coming here temporarily or to perform temporary services.

Appellants Ignore Their Statutory Remedy

Appellants in this action are, in effect, seeking to circumvent the Immigration and Nationality Act of 1952. Under the Act there is a statutory safeguard, § 214(a)(14), 8 U.S.C. § 1182(a)(14), against an influx of new commuters in circumstances where:

... the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed.

When such a certificate is issued, the working force in the United States is protected against the entry of new commuters. However, the Secretary has not seen fit to issue a certificate under the foregoing provision, although studies were made of unemployment by the Department of Labor in El Paso and Laredo, Texas. (J. A. 87). Thus, it is seen that instead of relying upon the statutory safeguard provided by Congress, Appellants ignore their statutory remedy and seek, by this suit, to circumvent the statute.

Judge Youngdahl's Interlocutory Order

Appellants rely strongly in their brief and in the complaint upon the interlocutory opinion of Judge Youngdahl entered in *Amalgamated Meat Cutters v. Rogers*, 186 F. Supp. 114 (D.D.C. 1960). It should be noted that Judge Walsh issued the final order in the case and that he did not specifically approve or in any way adopt the interlocutory ruling of Judge Youngdahl.

Furthermore, it should be noted that the facts in *Amalgamated Meat Cutters* are entirely different than the facts

in this case. There, there was a certificate issued by the Secretary of Labor under section 212(a)(14). Here there is none.

Amalgamated Meat Cutters v. Rogers was a case in which plaintiff labor organization was the collective bargaining representative for employees of the Peyton Packing Company in El Paso, Texas, where a strike was in progress. Because plaintiff therein believed that strikers were being replaced by aliens resident in Juarez, Mexico, *plaintiff petitioned and received from the Secretary of Labor a certificate pursuant to the provisions of section 212(a)(14)(B) of the Immigration and Nationality Act of 1952*, wherein the Secretary of Labor determined that the "admission of any aliens to the United States for employment at the Peyton Packing Company of El Paso, Texas, during the strike presently in progress will adversely affect the wages and working conditions of workers in the United States similarly employed." Plaintiff brought suit, seeking an order in the nature of mandamus against the Attorney General, when it appeared that the above certificate was being construed by immigration officials as not to apply to "returning lawfully domiciled resident aliens," and that commuters fell within the latter category.

Defendants in the *Amalgamated Meat Cutters* case moved to dismiss, or, in the alternative, for summary judgment. In *denying* such motion of defendants, Judge Youngdahl wrote the opinion relied upon by Appellants. We respectfully submit that in this interlocutory opinion the court erred with respect to the issue whether to be "lawfully admitted for permanent residence," residence in the United States is required.

More than six months later plaintiff's motion for summary judgment and defendants' cross-motion came before Judge Walsh of the District Court. There is no indication that Judge Walsh agrees or disagrees with the memorandum opinion of Judge Youngdahl. It is not proper, there-

fore, to allege that the final order of Judge Walsh was "based upon the earlier memorandum opinion." The final order of Judge Walsh was not appealed because at this stage the number of commuters involved had dwindled and the question was for all practicable purposes moot.

CONCLUSION

WHEREFORE, Intervenor Appellees, on the basis of the material submitted in this brief and on the basis of the material submitted to the District Court by Government Defendants and Intervenor Defendants, respectfully request this court to affirm the judgment of the District Court dismissing this action.

Dated at Washington, D. C., this 15th day of November, 1963.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief have been mailed to all counsel of record, as indicated below, this 15th day of November, 1963.

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APPELLANTS' PETITION FOR REHEARING

In the

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17, 976

TEXAS STATE AFL-CIO, ANTONIO AGUILAR,
JULIA AMAYA, *et al*,

Appellants,

v.

ROBERT KENNEDY, ATTORNEY GENERAL,
AND RAYMOND F. FARRELL, COMMISSIONER OF
IMMIGRATION AND NATURALIZATION,

Government Appellees,

and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES
(LEYVA), CONCEPCION AURORA CAGIGAS FRAJO, *et al*,
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PETITION FOR REHEARING

**TO THE HONORABLE JUDGES
OF SAID COURT:**

Appellants file this their petition for rehearing with reference to the decision herein dated February 6, 1964, and as grounds therefor respectfully state the following:

1.

The decision conflicts with prior decisions of this Honorable Court on the question of standing of

an aggrieved party to bring an action. Such prior conflicting decisions include the following cases:

- (a) *International Union of Electrical Workers v. United States*, 108 U.S. App. D. C. 97, 280 F.2d 645 (1960), in which labor unions were held to have standing to challenge an Atomic Energy Commission order which authorized construction of a nuclear power reactor. The Court held that the unions were "aggrieved" by the action of the Commission. The unions' intervention was based on the contention that building of the reactor would "create a hazard which will place the individual Intervenors, the members of the UAW and their families, and the UAW in danger of an explosion or other incident' damaging to the individuals and their homes, real estate values, and employment; that the value of collective bargaining contracts 'will be seriously impaired if the PRDC reactor is built in this area without reasonable assurances of safety'" [This case was reviewed by the Supreme Court without consideration of the standing of the unions to bring the action. *Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961).]
- (b) *National Coal Ass'n v. Federal Power Commission*, 89 U.S. App. D.C. 135, 191 F.2d 462 (1951), in which this Court recognized the standing of labor unions representing coal

miners and railroad employees to challenge the granting of a Federal Power Commission certificate for construction of a natural gas pipeline, on the basis that their members would lose employment because of the decrease in business by the railroads which would result from construction of the pipeline.

- (c) *Atchison, Topeka and Santa Fe Ry. Co. v. Somerfield*, 97 U.S. App. D.C. 325, 229 F.2d 777, in which a railroad was held to have standing, based on its investment in special equipment, to challenge validity of three cent airmail postal service.
- (d) *Copper Plumbing and Heating Co. v. Campbell*, 110 U.S. App. D.C. 177, 290 F.2d 368 (1961), in which this Court held that a company could challenge a listing of its name that had the effect of barring it from future government contracts for three years, on grounds that its was "prohibited from competing on an equal basis with others in the same industry," thus distinguishing the case from *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108, where "plaintiffs could not show 'an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.'"

2

The decision conflicts with principles laid down

by the Supreme Court on the question of standing.

- (a) *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963), in which the Court held that "appellants have in fact suffered a palpable injury" because of state agency action which impaired the sale of books published by appellants.
- (b) *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940), about which professor Kenneth Culp Davis¹ has written as follows:

"The only difference between the Tennessee Electric case² and the Sanders case that affects the problem of standing is that in the Tennessee Electric case no statutory provision affected the problem of standing but that in the Sanders case the statute provided for judicial review by an applicant or by 'any other person aggrieved or whose interests are adversely affected' If the key to the two holdings on standing lies in this statutory provision, then whenever the APA is applicable, a 'legal right' is unnecessary to confer standing, since the APA provides for review at the instance of 'any person . . . adversely affected or aggrieved . . . within the meaning of any relevant statute' [18Section 10(a).]

"The Sanders doctrine as further developed in the Scripps-Howard and KOA cases"³ [19Scripps-Howard Radio v. FCC, 316 U.S.

¹ Davis, *Administrative Law Treatise*, Vol. 3, pp. 221, 225.

² *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939).

³ *Scripps-Howard Radio v. FCC*, 316 U.S. 349, 42 S.Ct. 462, 80 L.Ed. 623 (1942).

4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942); *FCC v. NBC (KOA)*, 319 U.S. 239, 63 S.Ct. 1035, 87 L.Ed. 1374 (1943).] is of primary importance to the law of standing, for the Supreme Court in the three cases has enunciated the principle that one whose only interest in attacking the administrative action is to avoid a new or increased competition has standing to make the attack, even though it is specifically recognized that the attacker has no 'legal right' at stake."

* * *

"The Sanders case was decided under a statutory provision allowing review upon application of a 'person aggrieved or whose interests are adversely affected.' Since the Administrative Procedure Act allows judicial review upon application of 'Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute,' the Sanders doctrine is applicable to all administrative action subject to section 10(a) of the APA, . . ."

- (c) See also *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 285 (1961); *City of Chicago v. Santa Fe R. Co.*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958); *American Trucking Ass'n. v. United States*, 364 U.S. 1, 4 L.Ed.2d 1527, 80 S.Ct. 1570.
- (d) *Rusk v. Cort*, 369 U.S. 367, 7 L.Ed.2d 809, 82 S.Ct. 787, in which the Supreme Court announced that "the Court will not hold

that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions under the 1952 [Immigration and Nationality] Act in the absence of clear and convincing evidence that Congress so intended." [369 U.S. 379-380].

3.

The Opinion in the instant case failed to note that appellants base their standing on the Administrative Procedure Act as well as on the Immigration and Nationality Act of 1952.

4.

The Court erred in holding that

"To deny standing to a union and its members to bring such a suit is entirely consistent with the rulings in the *Tennessee, Alabama Power*, and *Kansas City* cases . . . which denied standing in fairly comparable situations to corporations and their shareholders." (Opinion, p. 5)

There are no allegations that the 188 individual plaintiffs are members of labor unions. Some may be, but neither the pleadings nor the record reflects any labor union affiliation, and they certainly did not bring this action as union members. Nor were these individual plaintiffs affected as members of the public generally, but rather as the persons who were granted a specific right under the 1952 Immigration and Nationality Act. The Opinion overlooked the fact that appellants complain both of action and inaction by the government appellees. Paragraph

17 of the Complaint alleges that defendants have failed to use the provisions of 8 U.S.C. §§101(a)(15)(H) and 1184, which provide for entry of an alien worker

“having a residence in a foreign country which he has no intention of abandoning . . . if *unemployed persons capable of performing such service or labor cannot be found in this country.*” (Emphasis added).

Appellants allege that these provisions provide an exclusive means for entry of alien labor of the type involved herein:

“Defendants have largely ignored the provisions of Title 8 U.S.C. §§1101(a)(15)(H) and 1184 as a source of alien labor which can be made available without displacing the employment of workers in the United States. Instead, defendants have knowingly permitted the use of permanent resident alien status by commuting aliens who are residents of contiguous foreign territory. By this ‘amiable fiction,’ I-151 border crossing identification cards, which are designed solely for issuance to bona fide residents of the United States with a current status of permanent resident alien, are used as a device to permit daily commutation entry of residents of a foreign country for the sole purpose of engaging in employment in the United States. *Such use violates the Act, and is in derogation of the letter and intent of said Act regarding use of the express provisions referred to herein above, and also Title 8 U.S.C. §1182(a)(14), for entry of aliens to engage in employment under conditions which will safeguard domestic labor.*” (Emphasis added, Complaint, paragraph 17, J.A. 17-18)

Each of the 188 individual plaintiffs was asserting a *statutory right* to be free from the employment competition of alien workers who continued to reside in foreign territory, except when there were no "unemployed persons capable of performing such service or labor" to be found in the United States. Thus, these individual plaintiffs, who have each "been unemployed for various periods during the years 1960 and 1961, at a time when commuting aliens with I-151 border crossing identification cards were working at jobs in the United States which plaintiffs were capable of performing," [J.A. 20] had standing to enforce the provisions of the Act which, according to extensive legislative history, were especially designed for their benefit and the benefit of others similarly situated. Who could have better standing to enforce these provisions than the very persons who were unemployed at times when commuting aliens were working at jobs for which plaintiffs were available to perform and capable of performing? Appellants are prepared to prove these factual allegations of the Complaint as to each individual plaintiff, but in the present state of the record these facts stand without challenge for purposes of the motions to dismiss.

5.

Plaintiff Texas State AFL-CIO and its component labor unions are also "aggrieved" by the action and inaction of government defendants, for paragraph 11 of the Complaint [J.A. 13] alleges that

"... defendants have failed and refused to 'utilize the documentary requirements and ad-

ministrative procedures' available under the applicable law, to wit, under Title 8 U.S.C. §1101(a)(15)(H) and Title 8 U.S.C. §1184, as a means to permit Mexican aliens to live in Mexico and work in the United States under conditions which will not jeopardize the working conditions and employment opportunities of bona fide residents of the United States."³

These procedures were expressly included in the Act in response to the pleas of organized labor contained in voluminous testimony before Congressional Committees.⁴ Certainly that portion of organized labor which is directly affected by defendants' action and inaction has standing to challenge the failure of the governmental officials to enforce the very provision which, in the opinion of the Conference Committee,

"... will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country."⁵

³ Paragraph 21 of the Complaint [J.A. 20-21] reads as follows:

"Plaintiff Texas State AFL-CIO and its component labor unions have also suffered as a result of defendants' action and inaction regarding commuting aliens, because such aliens have provided employers with a virtually endless supply of employees who are willing to work for low wages and, because of their precarious status as 'immigrants' and their residence in a foreign country, are almost guaranteed to be non-union. Such commuters also prevent or discourage American labor organizations from engaging in legitimate strike activity to improve wages and working conditions because commuting aliens have provided an ever ready source of strike breakers available to work despite strike conditions."

⁴ Joint Hearings before the Sub-Committee of the Committee on the Judiciary, Congress of the United States, 82nd Cong., First Session on S. 716, H.R. 2379, and H.R. 2816, March 6 through April 9, 1951, pp. 117-122, 662-667, 712-713, *inter alia*.

⁵ p. 1705, U.S. Code Cong. & Admin. News, 82nd Cong. 2nd Sess. 1952.

See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624.

6.

Appellants readily agree that ordinarily individual immigrants, or those who have been granted such status,

"... are entitled to have their status and their rights adjudicated on the particular facts of their own cases, the circumstances of their entry, the representations made to them, the nature of their own conduct, and any other factors which might reasonably be urged on their behalf." (Opinion, p. 5)

However, such individual factors are not involved in this proceeding, for the government defendants admit they have not required residence in the United States as a condition for the conferring of permanent resident alien status on commuters. Thus, purely a law question is presented, and the commuters are represented as a class in this action by an able and distinguished law firm. The commuters' motion to intervene alleged, which allegation is not in issue in this appeal, that they "fairly insure the representation of the others in the class. The character of the right sought to be protected, namely, the status and right of commuting aliens, is several. *This case involves a common question of law and fact affecting these several rights* and a common relief is sought." (Emphasis added, J.A. 31-32).

Assuming appellants are successful in their action, individual aliens would still have every legal

right to have their individual cases determined in accordance with the law, and anyone of them would have a right to maintain his immigrant status by maintaining residence in the United States. Thus, it is incorrect to characterize appellants' action as an attempt to exclude these persons from the United States. They have been granted the right to reside permanently in the United States and appellants welcome and encourage them to exercise that right. But those who do not exercise that right would not necessarily be excluded either, for they can obtain entry, subject to the safeguards based on available domestic workers, as non immigrant workers under 8 U.S.C. §101(a) (15) (H) and §1184.

7.

This Honorable Court stated (Opinion, p. 5) that "Normally any challenge to their [the commuters'] status would be brought by the Government officials immediately concerned." However, that is what this action is all about—the refusal of the government to challenge such status based on the alien's failure to maintain residence in the United States. If appellants do not have standing to bring this refusal to the attention of the judicial branch of the government, then who else would have better standing? This rhetorical question only points up the effect of the Court's decision, which is to make the provisions in question unreviewable.

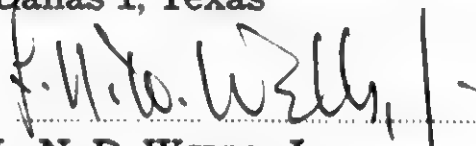
WHEREFORE, PREMISES CONSIDERED, plaintiffs respectfully urge that the Opinion herein be withdrawn, and that the relief prayed for in appellants Complaint and briefs heretofore filed be granted, for the Immigration and Nationality Act of 1952 is being seriously violated and appellants are being seriously damaged.

Respectfully submitted,

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February 20, 1964



SUPPLEMENTAL
BRIEF FOR GOVERNMENT APPELLEES

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 20 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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and RAYMOND F. FARRELL, COMMISSIONER
OF IMMIGRATION AND NATURALIZATION,

Government Appellees,

and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES
(LEYVA), CONCEPCION AURORA CAGIGAS FRAIJO,
et al.,

Intervenor Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR GOVERNMENT APPELLEES

This supplemental brief is being filed with leave of the Court, given at the argument of this appeal on December 17, 1963. It is limited to two points:

I. Section 101(a)(32) of the Immigration and Nationality Act sustains appellees's basic position on the merits.

Appellants err in relying in any respect on Section 101(a)(32) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(32).^{1/} They evidently entirely miss its purport. Actually, that section sustains appellees' basic position

^{1/} Appellants' reply brief, at pp. 10-11; original brief at pp. 22-23.

here on the merits. It requires that an alien be classified as an "immigrant" if he does not clearly fall within a specific "nonimmigrant" category. Alien commuters do not fall within any specified "nonimmigrant" category. Section 101(a)(32) reads as follows:

The term "quota immigrant" means any immigrant who is not a nonquota immigrant. An alien who is not particularly specified in this Act as a nonquota immigrant or a nonimmigrant shall not be admitted or considered in any manner to be either a nonquota immigrant or a nonimmigrant notwithstanding his relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

As we pointed out (both at the argument and in our original brief ^{2/}) alien commuters regularly reenter the United States, after effecting original lawful admission as "immigrants," to perform work in this country of a continuing or permanent nature. Hence, they cannot "be admitted or considered in any manner" to be within the "nonimmigrant" category set forth in Section 101(a)(15)(H)(ii) of the Act, 8 U.S.C. 1101(a)(15)(H)(ii). For, they are not "coming temporarily to the United States to perform temporary services or labor." And, under the doctrine long ago enunciated in Karnuth v. United States ex rel. Albro, 279 U.S. 231 (1929), they cannot "be admitted or considered in any manner" to be within the "nonimmigrant" category set forth in Section 101(a)(15)(B) of the Act, 8 U.S.C. 1101(a)(15)(B). For, they are not "visiting the United States temporarily for business or temporarily for pleasure." And appellants do not suggest

^{2/} At pp. 21-22.

that the alien commuters fall within any other "nonimmigrant" category specified in Section 101(a)(15) of the Act. (As set forth in our original brief, see in particular pp. 54-56), Section 101(a)(15) by definition makes any arriving alien an "immigrant" if he does not come within a specified
Hence,
"nonimmigrant" category. /Section 101(a)(32) thus simply reinforces Section 101(a)(15) in compelling the conclusion that alien commuters must be deemed to be "immigrants" within the meaning of the Immigration and Nationality Act.

The Board of Immigration Appeals concluded in Matter of H-- O--, 5 I. & N. Dec. 716, 717 (1954), that this result necessarily follows under the Immigration and Nationality Act:

Since Section 101(a)(15)(B) of the Act of 1952 has not changed the statutory provisions governing nonimmigrant temporary visitors, commuters may not be admitted under this section any more than they were eligible for admission under Section 3(2) of the act of 1924. Nor has section 101(a)(15)(H)^{3/} specifically changed the administrative practice for commuter admission. * * * [A]l- though section 101(a)(15)(H) has added a new statutory class of nonimmigrants, alien commuters as persons coming to the United States to engage in regular employment are not included in this group of aliens coming here temporarily or to perform temporary services. [Emphasis supplied.]

3/ This is the "nonimmigrant" classification on which appellants solely rely here.

4/ The printed word is an obvious typographical error; it reads "SATURDAY."

This brings us to appellants' claim (at p. 10 of their reply brief) that Section 101(a)(32) of the Immigration and Nationality Act "abolished all non-statutory categories of immigrants." We note that alien commuters have never been regarded to be within any "non-statutory category of immigrants" -- either under the 1924 Act or under the Immigration and Nationality Act. Under both Acts, the Immigration authorities have always regarded alien commuters to be within the statutory nonquota "immigrant" category of "Immigrants" returning from a temporary visit abroad.

As set forth at pp. 56-57 of our original brief: Under the Immigration Act of 1924, the Immigration authorities (commencing with their General Order No. 86 in 1927) deemed the alien commuters -- once lawfully admitted as "immigrants" -- to be entitled to reentry in recognized nonquota "immigrant" status (under Section 4(b) of the 1924 Act) as --

an immigrant previously lawfully admitted to the
United States who is returning from a temporary
visit abroad.

The leading court cases decided under the 1924 Act sustained the Immigration authorities' reading of the term "lawfully admitted to the United States" to mean "lawfully admitted to the United States for permanent residence as an 'immigrant'." And the Immigration authorities have since enactment of the Immigration and Nationality Act deemed alien commuters entitled to reentry in recognized nonquota "immigrant" status (under Section 101(a) 27(b) of that Act) as --

* * * an immigrant lawfully admitted for
permanent residence⁵ who is returning from
a temporary visit abroad. * * *

^{5/} The Court need bear in mind
Section 101(a)(20) of the Act.

the precise definition of this term in

The published Immigration and Nationality Decisions make this point clear beyond dispute.

In the very decision which appellants have repeatedly cited, Matter of M-- D-- S-- & L-- G-- & W-- D-- D--, 8 I & N. Dec. 209, 214 (1958), the Board of Immigration Appeals concluded:

* * * Thus, it would appear that a commuter is entitled to readmission as a returning resident, but * * * [only if] * * * he maintain[s] the status of a commuter.
[Emphasis and bracketed material supplied]

In a case decided in 1951 (before enactment of the Immigration and Nationality Act), Matter of E--, 4 I. & N. Dec. 454, 457, the Board of Immigration Appeals similarly held that under the Immigration Act of 1924 an alien commuter was entitled to "be readmitted to the United States as a legal returning resident" under Section 13(b) of the Act, former 8 U.S.C. 213(b). That section permitted the readmission to the United States of lawfully admitted "immigrants" who "depart therefrom temporarily", without having to secure new immigrant visas.

And in Matter of D-- C--, 3 I & N. Dec. 519 (1949) (another alien commuter case decided under the 1924 Act), the Commissioner pointed out in his discussion (id. at 520):

To be admissible under Section 4(b) [of the Immigration Act of 1924, former 8 U.S.C. 204(b)] an alien must establish he is (1) an immigrant previously lawfully admitted for permanent residence, and (2) returning from a temporary visit abroad (8 C.F.R. 110.37). The appellant meets requirement * * * (1) in that he was duly

admitted as an immigrant and it is not established that he was inadmissible at that time. He does not, however, meet requirement (2) for the reason that he has not met his burden of establishing that his absence from the United States amounted to a "temporary visit abroad" or that he is "returning" to either a place of abode or employment in the United States. Since he has never taken up actual residence in the United States or employment of any kind in this country he cannot be said to be "returning to the United States" from a visit abroad. * * *

*** [Emphasis and bracketed material supplied.]

In that same case, the Board of Immigration Appeals on its review and approval of the Commissioner's ruling discussed the need of an alien seeking to reenter as an "alien commuter" to show employment in the United States in lieu of domicile in order to qualify as a returning "immigrant". Id. at 522.

Hence, we submit: Appellants are clearly wrong (reply brief, p. 11) in seeking to characterize alien commuters as having been classified by the Immigration authorities within a "non-statutory" category. The Immigration authorities -- both under the prior statute, the Immigration Act of 1924, and under the current statute, the Immigration and Nationality Act, always have consistently classified alien commuters within the statutory nonquota "immigrant" category of returning "immigrants."

- II. Appellants misconstrue the purport of the discussion in the Omnibus Study Report, S. Rep. No. 1515, concerning the Congress' policy determination not to place in the Immigration and Nationality Act any "immigrant" quota restrictions upon the entry of natives of Western Hemisphere countries.

At the argument of the appeal, we cited the discussion appearing in the Omnibus Study Report, S. Rep. No. 1515, (at pp. 472-474), which explains why the Congress determined as a matter of legislative policy not to place in the Immigration and Nationality Act any "immigrant" quota restrictions upon the entry of Mexicans, Canadians, or other Western Hemisphere aliens, to the United States for work purposes. Our point was that the traditional "good neighbor" policy of the United States clearly played an important role in persuading the Congress not to impose any such quota restrictions.

This point is important in two respects: First, the Section 101(a) (15(H)(ii) "nonimmigrant" category of workers coming temporarily to perform temporary services or labor--on which appellants exclusively rely--was never intended by the Congress to meet the problem of Western Hemisphere aliens coming to the United States as "immigrants" to work here in continuing, permanent employment. Second, the courts, in the exercise of a sound judicial discretion, should leave the working out of an accommodation of the interests of the Mexican and Canadian governments, on behalf of their nationals, on the one hand, with appellants' job interests, on the other, to a proper policy solution by the Congress.^{6/}

^{6/} An analogous accommodation by the Congress of the competing interests of our foreign policy and trade, on the one hand, and our domestic industries

At the argument, appellants cited the reference made in the Omnibus Study Report's recommendation (at p. 474) not to change the nonquota "immigrant" status for Western Hemisphere aliens, to the Congress' reliance, as a regulator of such immigration, upon "economic conditions," as well as upon "the qualitative restrictions in the law, such as those relating to literacy, health, morals."

We think it obvious from the discussion preceding the recommendation that this reference to "economic conditions" adverts to the "economic depression" deterrent referred to on p. 473.

As we have indicated, the "nonimmigrant" provision on which appellants rely in this litigation, Section 101(a)(15)(H)(ii), has absolutely nothing whatever to do with the discussion and policy recommendation in the Omnibus Study Report not to include in the Immigration and Nationality Act any "immigrant" quota restrictions upon the entry of natives of Western Hemisphere countries. By definition, the "immigrant" and "nonimmigrant" classifications are mutually exclusive. Hence, we do not perceive how the reference to "economic conditions" in this particular context can be of any aid to appellants here.

In this connection, we also take strong issue with appellants' claim (reply brief, p. 6) the 1950 Omnibus Study Report, S. Rep. No. 1515, is not as authoritative a legislative history source as the House and Senate

(continued from preceding page)

and workers, on the other, appears in the Trade Expansion Act of 1962, P.L. 87 - 794, 76 Stat. 872, et. seq., 19 U.S.C.A. 1801, et. seq. In 19 U.S.C. 1911-1917, the Congress made provision for assistance to industries hurt by trade expansion under the Act. And in 19 U.S.C. 1941-1961, the Congress made provision for assistance to workers injured by such trade expansion.

reports which accompanied the bills that came to be enacted as the Immigration and Nationality Act in 1952.

The House Report accompanying H. R. 5678, H. Rep. No. 1365, 82d Cong. 2d Sess. (1952) stated (at pp. 27-28):

H. R. 5678 has not been hastily conceived. The bill, as introduced, and as now reported with committee amendments, represents the final product of a most intensive and searching investigation and study of our entire immigration and naturalization system which originated over 3 years ago with the Committee on the Judiciary of the Senate and was subsequently conducted jointly by the Committees on the Judiciary of the House and the Senate.

Basic findings are contained in a voluminous report (S. Rept. 1515, 81st Cong., 2d Sess.)
Certain parts of that document are being incorporated in the instant report.

[Emphasis supplied.]

And the Senate Report accompanying S. 2550, S. Rep. No. 1137, 82d Cong. 2d Sess. (1952) stated (at p. 2):

The bill involves an undertaking which has never before been accomplished, namely the revision and codification of all the immigration and naturalization laws. The proposed legislation has not been hastily conceived. It is rather a result of an intensive investigation and study of our entire immigration and naturalization system which was made over the course of 2-1/2 years by a subcommittee of this committee, pursuant to Senate Resolution 137 of the Eightieth Congress, first session, and subsequent resolutions authorizing the continuance of the investigation and study. The subcommittee and its staff spent literally thousands of hours of time in the study and investigation. It studied not only the history of the immigration policy of the United States but the immigration policies of other countries. It explored the history and development of international migrations and the problems of population and natural resources and studied the characteristics of the

population of the United States insofar as they are related to our immigration and naturalization system. The subcommittee also studied the organization and functions of the agencies of the Government which are concerned with the administration and operation of our immigration and naturalization laws. It studied each of the thousands of provisions of our immigration and naturalization laws with the end in view of appraising their adequacy, force, and effect and in conjunction therewith the judicial and administrative interpretations of the provisions of the law and the rules and regulations implementing them.

In the course of its investigation, the subcommittee obtained and considered appraisals and suggestions from several hundred officers and employees of the Immigration and Naturalization Service and the Visa and Passport Divisions of the Department of State. In addition, the subcommittee received and considered appraisals and suggestions from numerous individuals and representatives of various interested nongovernmental organizations.

Simultaneously with the filing of a comprehensive and detailed report on our immigration and naturalization system (S. Rept. 1515 of the 81st Cong., 2d sess.) on April 20, 1950, Senator Pat McCarran introduced S. 3455 in the Senate which provided for the repeal of all of the immigration and naturalization laws and the enactment of a completely revised immigration and naturalization code. * * *

In all respects material to the present litigation, S. Rep. No. 1515 and the later reports are wholly consistent. The foreword in S. Rep. No. 1515 (at pp. 1-4) gives an interesting account of the "full and complete investigation of our entire immigration system" conducted by the Senate Judiciary Committee from 1948 to 1950, pursuant to Senate Resolution, which led to the making of this Omnibus Study Report.

Hence, we submit, S. Rep. No. 1515 should be regarded for our present purposes as being equally authoritative as H. Rep. 5678 and S. Rep. No. 1137.

CONCLUSION

Government appellees respectfully again pray that the judgment of the District Court be affirmed on the jurisdictional, or abstention-from-taking-jurisdiction, grounds urged by them. In the event it is necessary to reach the merits, the judgment of the District Court should be modified so as to indicate dismissal on the merits, and, so modified, affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Supplemental Brief have been airmailed to Dallas attorneys for the appellants, Charles J. Morris, Esq., Mullinax, Wells, Morris & Mauzy, 1601 National Bankers Life Building, Dallas, Texas, and have been sent by regular mail to local attorneys for the appellants, J. Albert Woll, Esq., 736 Bowen Building, Washington, D.C. 20005, and to attorneys for intervenor appellees, Michael J. Shea, Esq., Chapman and Friedman, 932 Pennsylvania Building, Washington, D.C. 20004, this 19th day of December, 1963.

/s/ GIL ZIMMERMAN,
GIL ZIMMERMAN,
Assistant United States Attorney.

